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# Roadblock to Recovery: How FEMA's Liability Insurance Mandate Denies Low-Income Disaster Survivors Essential Transportation Benefits

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## **ROADBLOCK TO RECOVERY: HOW FEMA'S LIABILITY INSURANCE MANDATE DENIES LOW-INCOME DISASTER SURVIVORS ESSENTIAL TRANSPORTATION BENEFITS**

ANNE SIKES HORNSBY\*

*For better or worse, we live in a society dominated by the automobile; Americans are notoriously dependent on automobiles for access to goods and services, for social and economic development, and for sustenance. In disaster situations, transportation can be critical to individual and household recovery efforts, particularly for those in areas with no public transportation or where public transportation has been disrupted. FEMA's statutory mandate charges the agency with "alleviat[ing] the suffering and damage," and unsurprisingly, this mandate encompasses disruptions to local transportation systems; the agency's statutes and regulations authorize FEMA to provide financial aid for transportation needs, including repair or replacement of disaster-damaged personal vehicles. But to be eligible, FEMA requires proof of an applicant's auto accident liability insurance—despite the fact that such insurance would not have covered the damaged vehicle. The only plausible policy reason given for this rule is that FEMA will not provide aid for vehicles not in compliance with state law. However, state mandatory insurance laws exist to reduce the numbers of uninsured motorists, a goal with little, if any, discernible relationship to FEMA's mission of disaster relief. Moreover,*

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*most uninsured vehicles are owned by low-income households, and the postdisaster punitive effect on uninsured disaster survivors could violate FEMA's antidiscrimination provisions, which include protections on the basis of economic status. What is more, auto insurance mandates are of dubious efficacy—raising more questions about the eligibility requirement. This Article examines and critiques the FEMA auto insurance mandate in light of the agency's mission and history, and the mandate to alleviate disaster-related economic harms to low-income families. Further, this Article considers both the policy arguments and the potential for successful challenges to the policy through litigation or agency procedures.*

I.	INTRODUCTION .....	737
II.	FEMA'S POLICY REQUIRING DISASTER SURVIVORS TO PROVE CURRENT AUTO LIABILITY INSURANCE .....	743
	A. <i>Legislative History of the Stafford Act and FEMA's         IVINS Policy</i> .....	745
	B. <i>FEMA's IVINS Policy and Mandatory Auto Insurance         Laws</i> .....	750
	C. <i>The Disjunction Between FEMA's IVINS Rule and State         Insurance Mandates</i> .....	756
	D. <i>Does the Insurance Mandate Discriminate Against Low         Income Survivors?</i> .....	759
III.	STAFFORD ACT PROHIBITION ON ECONOMIC STATUS DISCRIMINATION AND FEMA'S IVINS RULE .....	763
	A. <i>Possible Challenges to the Mandatory Liability Insurance         Requirement by FEMA</i> .....	764
	B. <i>The Scope of FEMA Nonliability</i> .....	766
	1. <i>FTCA Precedent and FEMA's "Propinquity"             Standard</i> .....	767
	2. <i>Administrative Procedures Act Application</i> .....	769
IV.	THE DIFFICULTIES OF MAKING A SUCCESSFUL CHALLENGE TO THE FEMA'S IVINS RULE .....	771
	A. <i>Discretionary Act?</i> .....	771
V.	"ARBITRARY, CAPRICIOUS, MANIFESTLY CONTRARY TO STATUTE," OR AN "ABUSE OF DISCRETION"? .....	777
VI.	CONSTITUTIONAL VIOLATION? .....	779
	A. <i>Due Process</i> .....	782
	B. <i>Equal Protection</i> .....	784
VII.	POLITICAL ACTION .....	786
VIII.	CONCLUSIONS .....	787

## I. INTRODUCTION

Americans are notoriously dependent on their automobiles. According to the World Bank, there are approximately 800 vehicles for every 1,000 people in the United States, and more than three-fourths of those are passenger vehicles.<sup>1</sup> Roughly 95% of American households own at least one automobile.<sup>2</sup> Commuting statistics from the 2009 U.S. Census Bureau show that an overwhelming 86.1% of working Americans, or about 120 million people, travel an average of 25.1 minutes to reach their workplace or return home.<sup>3</sup> Approximately 86% of those commute in a car, truck, or van, and over 75% of those people drive alone in a passenger vehicle.<sup>4</sup> Although essential to employment, commuting to work is only a small portion of the miles we drive, representing less than 20% of all trips taken by Americans.<sup>5</sup> For the vast majority of us, a passenger vehicle is a virtual necessity for access to services and goods as well as support for family and community interaction and economic and social development.<sup>6</sup>

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1. *Motor Vehicles (per 1,000 People)*, WORLD BANK, <http://data.worldbank.org/indicator/IS.VEH.NVEH.P3/countries/1W?display=default> (last visited Feb. 14, 2013); *Passenger Cars (per 1,000 People)*, WORLD BANK, <http://data.worldbank.org/indicator/IS.VEH.PCAR.P3/countries/1W?display=default> (last visited Feb. 14, 2013). World Bank defines passenger vehicles as four-wheeled vehicles that seat less than nine persons. *See id.*

2. ROBIN CHASE, U.S. DEP'T OF STATE, YOU ASKED DOES EVERYONE IN AMERICA OWN A CAR? 1 (Mar. 19, 2010), *available at* [http://photos.state.gov/libraries/cambodia/30486/Publications/everyone\\_in\\_america\\_own\\_a\\_car.pdf](http://photos.state.gov/libraries/cambodia/30486/Publications/everyone_in_america_own_a_car.pdf).

3. U.S. CENSUS BUREAU, U.S. DEP'T OF COMMERCE, COMMUTING IN THE UNITED STATES: 2009, at 2–3 (Sept. 2011).

4. *Id.* at 2 tbl.1.

5. *Id.* at 1 (citing A. SANTOS ET AL., FED. HIGHWAY ADMIN., U.S. DEP'T OF TRANSP., SUMMARY OF TRAVEL TRENDS: 2009 NATIONAL HOUSEHOLD TRAVEL SURVEY 21 tbl.10 (June 2011), *available at* <http://nhts.ornl.gov/2009/pub/stt.pdf>).

6. *See* FED. HIGHWAY ADMIN., U.S. DEP'T OF TRANSP., NPTS BRIEF: MOBILITY AND THE MELTING POT 3 (Jan. 2006) [hereinafter NPTS BRIEF], *available at* <http://nhts.ornl.gov/briefs/Mobility%20and%20the%20Melting%20Pot.pdf>. Former Massachusetts Governor and presidential candidate Mitt Romney said in a 2011 interview:

[T]he government, of course, has a lot of mandates, and I know folks don't like that[—]mandates kids go to school, mandates they have to have auto insurance if [they] have an automobile. And my conservative friends say, "Well, we don't have to have automobiles." And it's like what state do you live in? Of course you have to have automobiles in this nation.

Bill O'Reilly, *Romney on 'The Factor': No Perry Beef, Obama's Iran Failure and States' Right to Mandate*, FOXNEWS.COM (Sept. 14, 2011), <http://www.foxnews.com/on-air/oreilly/2011/09/14/romney-factor-no-perry-beef-obamas-iran-failure-and-states-right-mandate>.

Populations who cannot drive—those who are too young, too old, disabled, or ill—rely on others who do drive as public transit options may be limited or inadequate and are nonexistent in most small towns and rural areas.<sup>7</sup> Studies show that access to a working vehicle has an impact on the ability to find employment.<sup>8</sup> Lack of adequate transportation has been cited as a factor in a wide array of social and health problems, as far reaching as an observed 25% increase in obesity in rural children who cannot access after-school programs<sup>9</sup> and veterans who report increased health problems due, in part, to inability to reach VA facilities.<sup>10</sup> The need for a vehicle is particularly pronounced among low-income populations.<sup>11</sup>

When disasters occur, this dependence on personal vehicles can be even more critical in the lives of those affected and their communities. With public and private services interrupted, facilities destroyed, schools and hospitals relocated, and families displaced or separated, most survivors need ongoing, long-term access to transportation to obtain even basic necessities.<sup>12</sup> Goods and services within easy reach predisaster may have been destroyed or damaged, requiring individuals to travel greater distances to find health care, fuel, retail pharmacies, and groceries.<sup>13</sup> Moreover, public transportation may be disrupted for long periods of time, making individual transportation the only viable

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7. See Nicholas Farber, *School Buses and Special Needs Transportation: Options for Policymakers*, NAT'L CONFERENCE OF STATE LEGISLATURES (Aug. 2008), available at <http://www.ncsl.org/print/transportation/schoolbusneeds08.pdf> (noting the need for "additional mobility for the general population in rural areas, where public transportation is limited or nonexistent. Around 38 percent of the nation's rural residents live in a community without public transportation, and another 28 percent live in a community with few public transportation options."); Lisa Margonelli, *Thinking Outside the Bus*, N.Y. TIMES OPINIONATOR BLOG (Nov. 17, 2011, 9:30 PM) <http://opinionator.blogs.nytimes.com/2011/11/17/thinking-outside-the-bus/> (reporting that only 5% of Americans use public transit for work, and only 1.2% of those in rural communities).

8. NPTS BRIEF, *supra* note 6, at 3 ("The impact of the limited mobility of lower-income men is not known for the specific individual, but overall such a limited range affects access to potential employers, and may restrict access to health services, education, shopping at discount stores, and a vast array of social and recreational activities.").

9. See *id.*; Margonelli, *supra* note 7.

10. See Margonelli, *supra* note 7.

11. Steven Garasky et al., *Transiting to Work: The Role of Private Transportation for Low-Income Households*, 40 J. CONSUMER AFF. 64, 65 (2006).

12. See, e.g., Alice Fothergill & Lori A. Peek, *Poverty and Disasters in the United States: A Review of Recent Sociological Findings*, 32 NAT'L HAZARDS 89, 98, 100 (2004).

13. See *id.* at 100.

alternative for those who ordinarily use public transit.<sup>14</sup> Rural citizens without public transportation options may be the most vulnerable. Restoring Americans' access to private transportation would seemingly be an important priority after a disaster, as it is necessary to promote independence and return lives to order as soon as possible.

Disaster recovery widely impacts those directly affected as well as our larger communities and economies. In 2011, the President declared ninety-nine FEMA major disasters, and in 2012, forty-seven.<sup>15</sup> During that time, forty-six states, the District of Columbia, and Puerto Rico all had at least one.<sup>16</sup> The Robert T. Stafford Disaster Relief and Emergency Assistance Act (the "Stafford Act")<sup>17</sup> authorized the establishment of the Federal Emergency Management Agency (FEMA), now a branch of the Department of Homeland Security, which spearheads federal response after disasters.<sup>18</sup> Created through the merger of several agencies with disaster-related duties in 1979, and with a legacy beginning in 1803,<sup>19</sup> FEMA is charged with one central purpose:

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14. *E.g.*, Rich Sampson, *The Return of New Orleans' Transit Legacy*, COMMUNITY TRANSP., June 1–6, 2008, at 6, 9–12, available at <http://web1.ctaa.org/webmodules/webarticles/articlefiles/NORTA.pdf>.

15. *Disaster Declarations for 2011*, FEMA, [http://www.fema.gov/disasters/grid/year/2011?field\\_disaster\\_type\\_term\\_tid\\_1=All](http://www.fema.gov/disasters/grid/year/2011?field_disaster_type_term_tid_1=All) (last visited Jan. 20, 2013); *Disaster Declarations for 2012*, FEMA, [http://www.fema.gov/disasters/grid/year/2012?field\\_disaster\\_type\\_term\\_tid\\_1=All](http://www.fema.gov/disasters/grid/year/2012?field_disaster_type_term_tid_1=All) (last visited Feb. 18, 2013). The definition of major disaster, as used by FEMA, is

[a]ny natural catastrophe (including any hurricane, tornado, storm, high water, winddriven water, tidal wave, tsunami, earthquake, volcanic eruption, landslide, mudslide, snowstorm, or drought), or, regardless of cause, any fire, flood, or explosion, in any part of the United States, which in the determination of the President causes damage of sufficient severity and magnitude to warrant major disaster assistance under this Act to supplement the efforts and available resources of States, local governments, and disaster relief organizations in alleviating the damage, loss, hardship, or suffering caused thereby.

44 C.F.R. § 206.2(a)(17) (2011).

16. *Disaster Declarations for 2011*, *supra* note 15; *Disaster Declarations for 2012*, *supra* note 15. The other four states and the year of their last major disaster declaration are Arizona (2010), Michigan (2008), Nevada (2008), and South Carolina (2006). *Disaster Declarations by State*, FEMA, <http://www.fema.gov/disasters/grid/state> (last visited Jan. 20, 2013). For FEMA Disasters by year or state, see *Disaster Declarations*, FEMA, <http://www.fema.gov/disasters> (last visited Feb. 25, 2013).

17. 42 U.S.C. §§ 5121–5207 (2006 & Supp. V 2011).

18. *Organizational Chart*, U.S. DEP'T OF HOMELAND SEC. (Apr. 1, 2012), <http://www.dhs.gov/xlibrary/assets/dhs-orgchart.pdf>.

19. For a short history of government disaster response agencies and legislations, see *About the Agency*, FEMA, <http://www.fema.gov/about> (last visited Feb. 25, 2013).

assisting state and local governments “to alleviate the suffering and damage” caused by emergencies and major disasters through prevention, mitigation, and recovery.<sup>20</sup> FEMA states that “[t]he recovery mission seeks to support communities in rebuilding so individuals, civic institutions, businesses, and governmental organizations can function on their own, return to normal life, and protect against future hazards.”<sup>21</sup> In a major disaster, the Stafford Act expressly authorizes grants of financial assistance to households and individuals for “necessary expenses or serious needs,” recognizing that among those essentials are funds to repair or replace individuals’ personal vehicles.<sup>22</sup>

Despite this directive, survivors seeking FEMA aid to repair or replace a disaster-damaged vehicle are denied aid unless they can

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20. 42 U.S.C. § 5121. Section 5121 states, in relevant portion:

(b) It is the intent of the Congress, by this chapter, to provide an orderly and continuing means of assistance by the Federal Government to State and local governments in carrying out their responsibilities to alleviate the suffering and damage which result from such disasters by—

(1) revising and broadening the scope of existing disaster relief programs;

(2) encouraging the development of comprehensive disaster preparedness and assistance plans, programs, capabilities, and organizations by the States and by local governments;

(3) achieving greater coordination and responsiveness of disaster preparedness and relief programs;

(4) encouraging individuals, States, and local governments to protect themselves by obtaining insurance coverage to supplement or replace governmental assistance;

(5) encouraging hazard mitigation measures to reduce losses from disasters, including development of land use and construction regulations; and

(6) providing Federal assistance programs for both public and private losses sustained in disasters[.]

*Id.* Most of the powers given to the President by the Act were delegated by President George H.W. Bush to the Director of FEMA pursuant to 42 U.S.C. § 5164. Exec. Order No. 12,673, 54 Fed. Reg. 12,571 (Mar. 23, 1989). One notable exception is that the President, and not the FEMA Director, has the authority to declare a major disaster. *Id.*

21. *Region IV Recovery Division*, FEMA, <http://www.fema.gov/region-iv-recovery-division> (last updated Dec. 18, 2012).

22. 42 U.S.C. § 5174(e)(2) (2006 & Supp. V 2011) (including aid for “transportation”); *see also Disaster Assistance Available from FEMA*, FEMA, <http://www.fema.gov/disaster-assistance-available-fema> (last updated Aug. 10, 2012) (listing “disaster-related damaged to a vehicle” among “necessary expenses and serious needs caused by the disaster” for which money is available).



provide proof of current auto liability insurance.<sup>23</sup> The reasons for this precondition to relief are unclear, despite requests to FEMA representatives in response to assistance denials. The requirement is not stated within any FEMA statutory authority or regulations and was never proposed or published in the Federal Register for public comment. In fact, the requirement is difficult to find among FEMA's public information. The hinging of aid for damage or destruction of a vehicle on liability insurance—and liability insurance only—creates a disconnect in logic.

Unlike comprehensive or collision auto insurance, liability insurance has no bearing whatsoever on whether an owner's car can be repaired, regardless of the source of the damage. Auto insurance for liability only covers vehicle (property damage) and medical expenses (bodily injury) for persons in other vehicles when injured by the insured auto in an at-fault situation.<sup>24</sup> In a disaster situation, then, pure liability insurance will not repair or replace a survivor's automobile. Collision coverage or comprehensive insurance, on the other hand, will likely pay its insured parties in full for any damage to their vehicles, and those owners will not need FEMA assistance to continue with the necessity of transportation.<sup>25</sup> Those with liability coverage only are also eligible for financial assistance in this category, and SBA loans may be available to those with sufficient income and assets to qualify.<sup>26</sup> Ultimately, FEMA's practice leaves only those with neither collision nor liability to bear the losses in this category with no assistance, regardless of the level of need. It is logical to expect this category to include our poorest and most economically vulnerable citizens.

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23. This requirement appears in FEMA's *Help After a Disaster: Applicant's Guide to the Individuals & Households Program* handout, FEMA, HELP AFTER A DISASTER: APPLICANT'S GUIDE TO THE INDIVIDUALS & HOUSEHOLDS PROGRAM 15 (2008), available at <http://www.fema.gov/help-after-disaster>, and in the FAQ portion of its website, *Why am I Not Eligible for Assistance?*, FEMA, <http://www.fema.gov/why-am-i-not-eligible-assistance> (last updated June 15, 2012).

24. A clear explanation appears in *A Consumer's Guide to: Auto Insurance* published by the Washington State Office of the Insurance Commissioner: "Washington state requires liability coverage. This covers bodily injury and damage to property that you cause to others while using your car." WASH. STATE OFFICE OF THE INS. COMM'R, A CONSUMER'S GUIDE TO: AUTO INSURANCE 2 (2009), available at <http://www.insurance.wa.gov/publications/auto/consumerguideautoins.pdf>.

25. *Id.*; see also *Why am I Not Eligible for Assistance?*, *supra* note 23.

26. *Help After a Disaster: Applicant's Guide to the Individuals & Households Program*, *supra* note 23, at 4, 6.



It is said that disasters are great equalizers that strike across demographic and economic strata, which is often true for the terrible and tragic initial impact on communities following a major disaster.<sup>27</sup> For low-income households with fewer financial reserves, disaster creates a far more difficult time in recovery.<sup>28</sup> A number of commentators and scholars have asserted that FEMA practices have at times failed to assist those most in need,<sup>29</sup> in contravention of Congress's express directive to adopt policies which prevent discrimination on the basis of economic status.<sup>30</sup> Despite the centrality of the automobile to our daily lives, there has been little comment, and apparently no legal challenge to date, to the policy which denies otherwise qualifying survivors financial assistance for uninsured personal vehicles.<sup>31</sup> In Part I of the Article, I argue that a mandatory auto liability insurance requirement is counter to FEMA's purpose and antidiscrimination

27. Fothergill & Peek, *supra* note 12, at 89.

28. *Id.* at 90, 98–101.

29. See, e.g., Jonathan P. Hooks & Trisha B. Miller, *The Continuing Storm: How Disaster Recovery Excludes Those Most in Need*, 43 CAL. W. L. REV. 21, 48 (2006) (“The federal emergency response to this unprecedented natural disaster [Hurricane Katrina] suffered from abysmal planning and a lethargic response [by FEMA] to the needs of hurricane survivors in the devastated Gulf Coast.”); John K. Pierre & Gail S. Stephenson, *After Katrina: A Critical Look at FEMA's Failure to Provide Housing for Victims of Natural Disasters*, 68 LA. L. REV. 443, 477–78 (2008) (explaining that FEMA failed victims of Hurricane Katrina in many ways, namely “fail[ing] to provide adequate information and temporary housing assistance”); Elizabeth Pierson Hernandez, Comment, *Twice Uprooted: How Government Policies Exacerbate Injury to Low-Income Americans Following Natural Disasters*, 14 SCHOLAR 219, 223 (2011) (noting that over 10,000 people in Texas were rejected FEMA housing aid after Hurricane Dolly).

30. 42 U.S.C. § 5151(a) (2006 & Supp. V 2011). Section 5151(a) says in relevant part:

Non-discrimination in disaster assistance.

(a) Regulations for equitable and impartial relief operations:

The President shall issue, and may alter and amend, such regulations as may be necessary for the guidance of personnel carrying out Federal assistance functions at the site of a major disaster or emergency. Such regulations shall include provisions for insuring that the distribution of supplies, the processing of applications, and other relief and assistance activities shall be accomplished in an equitable and impartial manner, without discrimination on the grounds of race, color, religion, nationality, sex, age, disability, English proficiency, or economic status.

*Id.*

31. One of the few legal articles to mention this policy is Hooks & Miller, *supra* note 29, at 48 n.105 (“However, FEMA’s procedures in awarding such assistance can exclude low-income people. For example, benefits to replace vehicles lost in the storm were allocated only to those who could demonstrate they carried insurance on their vehicles (although such insurance almost never covers losses from events such as Katrina).”).

directive and inconsistent with legislative intent. Part II discusses whether the underlying state law public policy is effective in advancing FEMA's articulated reasons for its prerequisite, examining the effectiveness of mandatory auto insurance laws in reducing uninsured motorist percentages and costs of accidents overall. Part III examines whether FEMA's policy is vulnerable to judicial review or administrative procedure and how such a challenge might proceed and ultimately fare. Finally, Part IV concludes that via litigation or methods short of litigation, FEMA should reconsider and eliminate the postdisaster auto liability insurance requirement.

## II. FEMA'S POLICY REQUIRING DISASTER SURVIVORS TO PROVE CURRENT AUTO LIABILITY INSURANCE

The source of FEMA's conditioning assistance for motor vehicles upon proof of liability insurance is unclear. Searches for public documents relating how FEMA arrived at this policy have been fruitless. Nowhere within either the text of the Stafford Act, its codification, its legislative history, or in any regulations authorizing and governing FEMA's activities is auto liability insurance mentioned, nor is compliance with state auto insurance laws required as a prerequisite to repair or replace a vehicle.<sup>32</sup> Its absence is notable.

Regulations promulgated for FEMA to carry out its mission include a list of factors which may lead to ineligibility for assistance,<sup>33</sup> but auto

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32. See, e.g., 42 U.S.C. §§ 5121–5207; Disaster Relief Act of 1974, Pub. L. No. 93-288, 88 Stat. 143; 44 C.F.R. §§ 206.1–.115 (2011); S. REP. NO. 93-778 (1974), *reprinted in* 1974 U.S.C.C.A.N. 3070.

33. 44 C.F.R. § 206.113(b). The conditions are as follows:

(b) *Conditions of ineligibility.* We may not provide assistance under this subpart:

- (1) For housing assistance, to individuals or households who are displaced from other than their pre-disaster primary residence;
- (2) For housing assistance, to individuals or households who have adequate rent-free housing accommodations;
- (3) For housing assistance, to individuals or households who own a secondary or vacation residence within reasonable commuting distance to the disaster area, or who own available rental property that meets their temporary housing needs;
- (4) For housing assistance, to individuals or households who evacuated the residence in response to official warnings solely as a precautionary measure and who are able to return to the residence immediately after the incident;

liability insurance is not among them. Furthermore, as will be addressed later in this Article, the insurance industry and others have expressed serious doubt as to the efficacy of mandatory insurance laws,<sup>34</sup> making the punitive actions of FEMA in enforcement of these laws, especially in this context, even more puzzling.

FEMA's rationale for the liability insurance predicate to this form of transportation assistance seemingly appears only in its most informal policy statements, such as its publication in its "help" manual, its mobile assistance site, and its website.<sup>35</sup> Many applicants see it for the first time as a code symbol in a response letter from FEMA used to classify and inform applicants of the rejections of requests.<sup>36</sup> For uninsured motorist applicants seeking assistance with a disaster-damaged assistance, a five-

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(5) For housing assistance, for improvements or additions to the pre-disaster condition of property, except those required to comply with local and State ordinances or eligible mitigation measures;

(6) To individuals or households who have adequate insurance coverage and where there is no indication that insurance proceeds will be significantly delayed, or who have refused assistance from insurance providers;

(7) To individuals or households whose damaged primary residence is located in a designated special flood hazard area, and in a community that is not participating in the National Flood Insurance Program, except that financial assistance may be provided to rent alternate housing and for medical, dental, funeral expenses and uninsurable items to such individuals or households. However, if the community in which the damaged property is located qualifies for and enters the NFIP during the six-month period following the declaration then the individual or household may be eligible;

(8) To individuals or households who did not fulfill the condition to purchase and maintain flood insurance as a requirement of receiving previous Federal disaster assistance;

(9) For business losses, including farm businesses and self-employment; or

(10) For any items not otherwise authorized by this section.

*Id.*

34. See, e.g., Lynn Knauf, *Despite Compulsory Coverage Laws, Fight Against UMs Marches On*, INS. J. (Aug. 18, 2003), <http://www.insurancejournal.com/magazines/partingshots/2003/08/18/31637.htm>; *Mandatory Auto Insurance Does Not Reduce Number of Uninsured Drivers, Says Insurer Trade Group*, INS. J. (July 25, 2004), <http://www.insurancejournal.com/news/national/2004/07/25/44371.htm>.

35. *Help After a Disaster: Applicant's Guide to the Individuals & Households Program*, *supra* note 23, at 15; *Why am I Not Eligible for Assistance?*, *supra* note 23.

36. This code system was criticized post-Katrina and raised in plaintiff's claims in *Ridgely v. Federal Emergency Management Agency*, 512 F.3d 727, 730 (5th Cir. 2008) (complaining that FEMA's use of "confusing codes, instead of understandable explanations" was one process that violated Due Process).

letter code with this elaboration will appear: “IVINS-Vehicle - No Liability Insurance: Disaster assistance may not be provided for a vehicle that does not meet the terms of state law.”<sup>37</sup>

In searching for the source of this policy, a list of reasons for denial to responses appear under the question *Why am I not Eligible for Assistance?*<sup>38</sup> Four coded items relating to rejection of an individual’s application seeking assistance to repair or replace a vehicle are among them, and two of the four cite failure to comply with state laws.<sup>39</sup> (The other one is a similar code for failure to prove the vehicle is registered with the state motor vehicle department.)<sup>40</sup> This is the only instance in any category on the list where noncompliance with state law is cited as a reason for individuals or households to fail to qualify for financial assistance.<sup>41</sup>

#### *A. Legislative History of the Stafford Act and FEMA’s IVINS Policy*

A review of the legislative history of the Stafford Act’s predecessor bills, in particular a comprehensive report on disaster response by the Congressional Research Service (CRS), makes it clear that Congress intentionally eliminated the requirement of insurance as an eligibility factor for individual aid.<sup>42</sup> The CRS report includes a section-by-section description of the newly passed Disaster Relief Act of 1974 and discusses the changes made in the bill during conference between the Senate and the House.<sup>43</sup> In its explanation of 314, titled “Insurance Requirement,” the CRS notes that the compromise committee elected

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37. *Why am I Not Eligible for Assistance?*, *supra* note 23.

38. *Id.*

39. *Id.*

40. *Id.* The four items related to vehicles are:

- IVINS-Vehicle - No Liability Insurance: Disaster assistance may not be provided for a vehicle that does not meet the terms of state law.
- IVNE-Vehicle - Non Essential: Disaster assistance may not be provided for a vehicle when a second vehicle is available.
- IVNR-Vehicle - Not Licensed/Registered: Disaster assistance may not be provided for a vehicle that does not meet the terms of state law.
- IVRC-Vehicle - Cosmetic Damage: There was not enough damage to your vehicle for you to qualify for this program.

*Id.*

41. *See id.* (providing a complete list of rejection codes).

42. CONG. RESEARCH SERV., AFTER DISASTER STRIKES: FEDERAL PROGRAMS AND ORGANIZATIONS, H.R. REP. NO. 93-288, at 742 (1974).

43. *See id.* at 742–43.

to reject the idea of mandatory insurance of any kind as a qualifying factor for receipt of aid for individuals.<sup>44</sup>

Noting the conflicting positions of the administration and the Senate on this issue, CRS reports that a Senate version of the bill which expounded a mandatory insurance requirement to any type of public or private assistance provided was pared down to a very limited requirement.<sup>45</sup> The limited requirement, which remains intact in significant part today, applied the requirement only to certain public entities under specific programs of assistance.<sup>46</sup> Even the broader, discarded Senate version would not have denied aid to those without insurance after a first disaster: it applied prospectively.<sup>47</sup> That is, survivors were to insure replacement property for which they had received FEMA aid to purchase; otherwise they would be denied aid in a *subsequent* disaster.<sup>48</sup>

Significantly, one key point of concern raised in opposition to the requirement was its harsh impact on those whose failure to insure was due to an inability to pay the cost of insurance.<sup>49</sup> Recognition of the severity of the result postdisaster on low-income families, then, was

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44. *Id.* at 741–42.

45. *Id.*

46. *Id.* at 742.

47. *Id.*

48. Section 314 of the Senate bill required applicants for assistance to obtain any “reasonably available, adequate and necessary insurance” and provided that property for which assistance was previously provided was not eligible to receive additional assistance in the future unless all insurance required by such section had been obtained and maintained. S. REP. NO. 93-778, at 188 (1974), *reprinted in* 1974 U.S.C.C.A.N. 3070, 3082.

49. H.R. DOC. NO. 93-100, at 12 (1973). The report describes:

A provision of the proposed bill will require that loan applicants obtain insurance, when reasonably available, to cover property losses in future disasters. Disaster insurance will ensure that financing would be available to help individuals get back on their feet after disasters and protect the disaster victim from future losses and increased debt.

The emergency loan program, even as modified by PL 93-24, may in fact discriminate against the needy. They may not be able to qualify for a loan, since applicants must demonstrate some ability to repay and, currently, there is no other special provision to aid needy disaster victims. As an essential component of the new disaster assistance program, the legislation proposes to make funds available to the States to provide grants to needy persons affected by disasters. Since the States already have ongoing and recognized machinery to deal with the needy, such as State welfare offices, they can more appropriately and expeditiously administer this type of grant.

*Id.*

within the considerations in the debate in Congress as it contemplated the legislation.<sup>50</sup> Some policymakers and legislators proposed adoption of a national disaster insurance program, similar to the National Flood Insurance Program, and hearings included comments on the effects that a mandate of insurance would have on the poor.<sup>51</sup>

Speaking in opposition to the proposal that would have required people to obtain insurance on property repaired or replaced with FEMA aid, Red Cross officials made a point of its disaster-response philosophy of “meeting disaster-caused needs, not disaster losses,” and expressed reservations and strongly held concerns about imposing insurance requirements on low- and middle-income families.<sup>52</sup> The then-director of FEMA stated his support for a financial aid program in the form of outright grants to those who could not qualify for low interest

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50. See *To Investigate the Adequacy and Effectiveness of Federal Disaster Relief Legislation Part 5 (Proposed Legislation): Hearings Before the Subcomm. on Disaster Relief of the Comm. on Pub. Works*, 93d Cong. 168, 206 (1973).

51. S. REP. NO. 93-778, at 188, reprinted in 1974 U.S.C.C.A.N. 3070, 3082; See *To Investigate the Adequacy and Effectiveness of Federal Disaster Relief Legislation Part 5*, *supra* note 50, at 168. The Senate version, appearing below, was not adopted by Congress, who rejected the idea of universal disaster insurance as a prerequisite to receiving future assistance:

Applicants for assistance under this Act must obtain any reasonably available, adequate and necessary insurance to protect against losses to property which is replaced, restored, repaired or reconstructed with that assistance.

Property for which assistance was previously provided under this Act is not eligible to receive additional assistance in the future unless all insurance required by this section has been obtained and maintained.

S. REP. NO. 93-778, at 188.

52. *To Investigate the Adequacy and Effectiveness of Federal Disaster Relief Legislation Part 5*, *supra* note 50, at 168. Statement of George M. Elsey, President, American National Red Cross:

[W]e are concerned about the requirement that disaster victims must have purchased hazard insurance before being eligible for federally funded assistance after a disaster. . . .

Certainly the Red Cross does not object to requiring those who can afford to do so to purchase insurance but there will always be a certain number of low or even middle income families among them older people living on social security or other pensions, and young families struggling to make ends meet, who may not be able to afford the cost of insurance even at subsidized rates. . . .

If the legislation you are now considering proposes grants to people whose income level is so low that they cannot qualify for loans, yet conditions eligibility for grants on the purchase of insurance against future disaster losses, is it logical to expect such people to buy and maintain such insurance?

*Id.* at 168.

loans made available through the Small Business Administration (but subject to forgiveness), the only program available at that time to individuals and households.<sup>53</sup> Then Governor of Virginia, Linwood Holton, expressed similar sentiments and was unable to support a mandate with which the needy were unable to comply.<sup>54</sup>

Ultimately, the insurance mandate for property procured with financial assistance from FEMA was removed from the bill, leaving a requirement only for a very limited set of public facilities.<sup>55</sup> The CRC report states clearly of the adopted bill: “[M]ost important, there is no requirement for the purchase of insurance for property owned by individuals. All of the affected programs apply to governmental activities. Thus, an individual who failed to acquire insurance after a first disaster would suffer no penalty if a second disaster strikes.”<sup>56</sup> This statement not only reflects the outright rejection of an individual insurance mandate, but also demonstrates that even under the initially proposed Senate and Administration version, nothing as harsh as a penalty for first time disaster survivors was on the table.<sup>57</sup> Despite this history, somehow the insurance requirement for personal vehicles was

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53. *Id.* at 60. Statement of Thomas Dunne, Administrator, Federal Disaster Assistance Administration:

The provisions of title V on grants to the needy give special recognition that there are people in this country who don't have the ability to borrow money. . . .

What we are trying to reach through the need program by these grants are people who don't have the ability to borrow. This is special recognition.

*Id.*

54. *Id.* at 206. Statement of Hon. Linwood Holton, Governor, Commonwealth Of Virginia:

The requirement for the purchase of disaster insurance as a prerequisite for grants to cover uninsured property losses of needy families is questioned. A portion of the grant could be used to obtain the insurance initially, but the maintenance of this insurance by needy families would present a problem . . .

*Id.* at 193. Governor Holton went on to state, “I don't see how you can force them to do it if they don't have the money to buy it with.” *Id.* at 206.

55. 42 U.S.C. § 5154 (2006 & Supp. V 2011). The current version of the statute retains virtually the same provisions, though their internal references to other sections have been updated as modifications have been made over time. *Id.*

56. CONG. RESEARCH SERV., AFTER DISASTER STRIKES: FEDERAL PROGRAMS AND ORGANIZATIONS, H.R. REP. NO. 93-288, at 742 (1974).

57. *To Investigate the Adequacy and Effectiveness of Federal Disaster Relief Legislation Part 5*, *supra* note 50, at 73 (statement of Sen. Buckley) (“My understanding of the Administration bill is that the taking out of disaster insurance would not be a precondition for help during the first disaster.”).



grafted into FEMA's eligibility criteria, in seeming contravention of the Congressional intent.<sup>58</sup> FEMA does not impose any similar insurance mandate on any additional items in this "Other Needs" category for which financial assistance may be provided, which includes potentially insurable items such as medical and dental expenses, personal belongings, and funeral expenses.<sup>59</sup>

Similarly, no other aid eligibility criteria for individuals or households are based on compliance with state laws.<sup>60</sup> The complications of FEMA injecting itself into the enforcement of state auto insurance laws begs the question of whether this is a worthy policy position. Unlike the recent debate regarding a health insurance individual mandate, auto liability insurance laws have public support.<sup>61</sup> Some opposed to auto liability insurance laws believe state legislatures

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58. H.R. REP. NO. 93-1037, at 90 (1974) (Conf. Rep.), *reprinted in* 1974 U.S.C.A.N. 3091, 3100. The report describes:

It should be noted that it was the intention of the conferees, by limiting the applicability of section 314 to sections 402 and 419 of this legislation and section 803 of the Public Works and Economic Development Act of 1965, not to require under this legislation the purchase of insurance with respect to property owned by individuals.

*Id.*

59. *Disaster Assistance Available from FEMA*, *supra* note 22. FEMA's report notes:

Other than Housing Needs.

Money is available for necessary expenses and serious needs caused by the disaster. This includes:

- Disaster-related medical and dental expenses.
- Disaster-related funeral and burial expenses.
- Clothing; household items (room furnishings, appliances); tools (specialized or protective clothing and equipment) required for your job; necessary educational materials (computers, school books, supplies).
- Fuels for primary heat source (heating oil, gas).
- Clean-up items (wet/dry vacuum, dehumidifier).
- Disaster-related damage to a vehicle.
- Moving and storage expenses related to the disaster (moving and storing property to avoid additional disaster damage while disaster-related repairs are being made to the home).
- Other necessary expenses or serious needs as determined by FEMA.
- Other expenses that are authorized by law.

*Id.*

60. *See, e.g., Why am I Not Eligible for Assistance?*, *supra* note 23.

61. *See* AM. ASS'N OF MOTOR VEHICLE ADMIN., THE FINANCIAL RESPONSIBILITY & INSURANCE COMMITTEE RESOURCE GUIDE 15, *available at* [http://www.aamva.org/uploaded/files/mainsite/content/driverlicensingidentification/auto\\_insurance\\_financial\\_responsibility/fr%20guide.pdf](http://www.aamva.org/uploaded/files/mainsite/content/driverlicensingidentification/auto_insurance_financial_responsibility/fr%20guide.pdf).

are pressured into seemingly easy fixes by a few constituents who were injured and uncompensated for their losses.<sup>62</sup> Regardless, there is still good reason to wonder why FEMA is interested in enforcing this particular set of state laws. In order to properly address this policy question, it is helpful to examine the development and effectiveness of state mandatory automobile insurance laws.

*B. FEMA's IVINS Policy and Mandatory Auto Insurance Laws*

FEMA's sole published explanation for the denial of benefits to the owners of uninsured, disaster-damaged vehicles is that it may deny aid to those owners not in compliance with state law.<sup>63</sup> Taking that statement at face value, an examination of these compulsory insurance laws and their impact is valuable. There is no question that thousands of individuals suffer injury or loss as a result of the negligence of drivers of uninsured vehicles.<sup>64</sup> "Unlicensed and uninsured drivers are involved in more than 20 percent of the fatal crashes on America's highways," said Laura Kotelman, in an address at the annual meeting of the National Conference of State Legislators.<sup>65</sup> Unrecovered losses caused by uninsured drivers were estimated by the insurance industry at \$10.8 billion in 2007 alone.<sup>66</sup> States, traditionally the entities who have wide regulatory powers over the insurance industry,<sup>67</sup> have addressed the

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62. See Knauf, *supra* note 34.

63. *Why am I Not Eligible for Assistance?*, *supra* note 23 ("IVINS-Vehicle - No Liability Insurance: Disaster assistance may not be provided for a vehicle that does not meet the terms of state law.").

64. Fortunately, the overall number of vehicle accidents has declined dramatically since 2000. See U.S. CENSUS BUREAU, *Transportation: Motor Vehicle Accidents and Fatalities*, in THE 2012 STATISTICAL ABSTRACT 693 tbl.1103 (2012), available at <http://www.census.gov/compendia/statab/2012/tables/12s1103.pdf>.

65. *Mandatory Auto Insurance Does Not Reduce Number of Uninsured Drivers, Says Insurer Trade Group*, *supra* note 34. Ms. Kotelman is Property Casualty Insurers Association of America's (PCI)'s regional manager and senior counsel. *Id.*

66. See Larry Copeland, *1 in 7 Drivers are Not Insured: State Requirements Appear Ineffective*, USA TODAY, Sept. 12, 2011, at A1.

67. 15 U.S.C. § 1012 (2006 & Supp. V 2011). Section 1012 states:

(a) State regulation[.]

The business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business.

(b) Federal regulation[.]

No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or

uninsured motorist problem in various ways, most commonly by passing laws that make it mandatory to carry some form of auto insurance and penalize those who do not insure their vehicles.<sup>68</sup>

Motor vehicle insurance mandates were first enacted in Massachusetts in 1927 and not by another state until New York in 1956 and North Carolina in 1957.<sup>69</sup> By 1970, these were still the only three, but between 1971 and 1976, sixteen states adopted “no-fault” laws that made first-party insurance mandatory along with compulsory auto liability coverage.<sup>70</sup> The number of state insurance mandate laws grew slowly after that time, but now forty-nine states and the District of Columbia require some minimal level of insurance on individually owned automobiles.<sup>71</sup> The type of insurance required, the enforcement mechanisms, and the penalties for noncompliance vary widely from state to state.<sup>72</sup> The array of mandatory or compulsory insurance laws alone makes evident the states’ independence in oversight of the auto insurance industry and the lack of consensus about the most effective approach.

More basically, the scope of the uninsured motorist problem and whether mandatory liability insurance laws have an impact on the problem are issues that are anything but settled. A 1999 study by The National Association of Independent Insurers found compulsory auto insurance laws were largely ineffective and might be making the

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which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance: *Provided*, . . . the Sherman Act, . . . the Clayton Act, and . . . the Federal Trade Commission Act, . . . shall be applicable to the business of insurance to the extent that such business is not regulated by State Law.

*Id.*

68. *Mandatory Auto Insurance Does Not Reduce Number of Uninsured Drivers, Says Insurer Trade Group*, *supra* note 34; AM. ASS’N OF MOTOR VEHICLE ADMIN., *supra* note 61, at 16.

69. AM. ASS’N OF MOTOR VEHICLE ADMIN., *supra* note 61, at 11.

70. Scott E. Harrington, *Taxing Low Income Households in Pursuit of the Public Interest: The Case of Compulsory Automobile Insurance*, in INSURANCE, RISK MANAGEMENT, AND PUBLIC POLICY: ESSAYS IN MEMORY OF ROBERT I. MEHR 115, 116 (Sandra G. Gustavson & Scott E. Harrington eds., 1994).

71. Only New Hampshire has no requirement for individuals to insure their vehicles. INS. RESEARCH COUNCIL, UNINSURED MOTORISTS 1 (2011).

72. Cassandra R. Cole et al., *The Uninsured Motorist Problem: An Investigation of the Impact of Enforcement and Penalty Severity on Compliance*, 19 J. INS. REG. 613, 615 (2001); see AM. ASS’N MOTOR VEHICLE ADMIN., *supra* note 61, at 25, 27, 38, 50 (comparing, for example, the approaches of Arkansas, California, Illinois, and Michigan).

uninsured motorist problem worse in the long run.<sup>73</sup> It found that among twelve states that enacted such laws between 1976 and 1984, only four saw a reduction from the first full year to 1985, and the other eight saw increases in uninsured motorists from 3.5% to 57.9%.<sup>74</sup> For states that enacted compulsory liability laws post-1985, half saw increases in the uninsured motorist population and half saw decreases.<sup>75</sup> During this time, the number of claims and the losses caused by so-called “financially irresponsible drivers” went up.<sup>76</sup> Significantly, the Insurance Research Council’s (IRC) historical data shows a relatively stable rate of uninsured motorists, somewhere between 13% and 16% between 1990 and 2009,<sup>77</sup> during the same time that a number of states enacted their laws.<sup>78</sup>

Even the basic statistics on uninsured motorists, however, can be difficult to determine with confidence. There are at least four methods of estimating the number of uninsured motorists or motor vehicles,<sup>79</sup> with no consensus on which gives the most accurate picture. State agencies, industry organizations, and independent scholars or entities have used these methods alternatively or in some combination to generate a projected number and percentage of uninsured vehicles on U.S. roads.<sup>80</sup> The IRC, an insurance industry trade organization,<sup>81</sup>

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73. Cole et al., *supra* note 72, at 615–16; *A Failed Mechanism?*, INS. ADVOC., Aug. 29, 1998, at 1 (1998).

74. *A Failed Mechanism?*, *supra* note 73, at 15.

75. *Id.*

76. *Id.*

77. See *Compulsory Auto/Uninsured Motorists*, INS. INFO. INST. (Dec. 2012), [http://www.iii.org/issues\\_updates/compulsory-auto-uninsured-motorists.html](http://www.iii.org/issues_updates/compulsory-auto-uninsured-motorists.html). The rate declined from 14.9% in 2003 to 13.8% in 2007, then rose to 14.3% in 2008 and fell to 13.8 % in 2009, according to the IRC. Cole et al., *supra* note 72, at 614–15; *Compulsory Auto/Uninsured Motorists*, *supra*.

78. Cole et al., *supra* note 72, at 614–15.

79. J. Daniel Khazzoom, *What We Know About Uninsured Motorists and How Well We Know What We Know*, 19 J. INS. REG. 59, 64 (2000). The four methods are:

1. Matching of a DMV’s drivers’ registration database against insurers’ databases to identify vehicles that have been registered but not insured.
2. Random sampling of registered vehicles.
3. Comparison of the frequency of claims paid under uninsured motorist insurance with the bodily injury claims paid under liability insurance.
4. Sampling surveys of the insurance status of automobiles owned by households.

*Id.*

80. See, e.g., *infra* notes 82–86.

publishes statistics on the percentages of uninsured motorists by state each year, calculating it by comparing the number of bodily injury claims (those covered by at-fault drivers' insurance) with the number of uninsured motorist claims (those covered by the injured party's own uninsured motorist insurance).<sup>82</sup> The IRC compiles the information from nine auto insurance companies, which collectively represent approximately 50% of the private passenger auto liability insurance premiums in the United States.<sup>83</sup> This method is considered to be less accurate than either a database or random sampling method,<sup>84</sup> but the IRC statistics have been relied upon in a number of related studies since 1989,<sup>85</sup> all of which would be far less valuable for future comparisons should the IRC change its method of tracking uninsured motorists in the future.

J. Daniel Khazzoom, a retired Economics professor from the University of California-Berkeley, undertook an examination of various sources of information reported on uninsured drivers, and points out the shortcomings and biases inherent in each methodology.<sup>86</sup> He and others say that the IRC's methods upwardly bias the percentage of uninsured motorists on the road because the method does not account for hit-and-run accidents, liability claims denied for other reasons, the possibility that vehicle ownership and the driver are not interlinked, uninsured

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81. In *Uninsured Motorists*, the Insurance Research Council describes itself as:

[A] division of The American Institute for Chartered Property and Casualty Underwriters (The Institutes), a not-for-profit organization dedicated to providing educational programs, professional certification, and research for the property-casualty insurance business. The Council's purpose is to provide timely and reliable research to all parties involved in the public policy issues affecting risk and insurance, but the Council does not lobby or take legislative positions. The Council is supported by leading property-casualty insurance organizations.

INS. RESEARCH COUNCIL, *supra* note 71, at 40.

82. *Compulsory Auto/Uninsured Motorists*, *supra* note 77.

83. INS. RESEARCH COUNCIL, *supra* note 71, at 27–28.

84. AAMVA UNINSURED MOTOR VEHICLE RATE WORKING GRP. ET AL., STANDARDIZING THE WAY WE MEASURE THE UNINSURED MOTOR VEHICLE RATE 9, available at [http://www.aamva.org/uploadedFiles/MainSite/Content/SolutionsBestPractices/BestPracticesModelLegislation\(1\)/StandardizingTheWayWeMeasureUninsuredMVRates.pdf](http://www.aamva.org/uploadedFiles/MainSite/Content/SolutionsBestPractices/BestPracticesModelLegislation(1)/StandardizingTheWayWeMeasureUninsuredMVRates.pdf).

85. INS. RESEARCH COUNCIL, *supra* note 71, at 2–3; see Cole et al., *supra* note 72, at 614 n.1; *Compulsory Auto/Uninsured Motorists*, *supra* note 77.

86. Khazzoom, *supra* note 79; Stacey Palevsky, *Memoir of Baghdad Recalls Riches of a Vanishing Culture*, JWEEKLY.COM (Aug. 12, 2010), <http://www.jweekly.com/article/full/58927/memoir-of-baghdad-recalls-riches-of-a-vanishing-culture/> (“Khazzoom, now 78, retired from U.C. Berkeley's economics department in 2000.”).

motorists involved in more than one accident, disputed and litigated claims, and fraud in UM claims, along with a lack of effort or estimate of bias in the calculations.<sup>87</sup> Similarly, accidents with out-of-state insured motorists or stolen vehicles may be counted within UM claims as well.<sup>88</sup> In an attempt to address this confusion, the American Association of Motor Vehicle Administrators has advocated a standardization of methods for measurement of uninsured motor vehicles.<sup>89</sup> It advocates for what it views as the most accurate methods of either random survey techniques or a current database,<sup>90</sup> both of which include considerable costs beyond the IRC method.

Even the term “uninsured motorist” is a misnomer, since mandatory liability insurance attaches to vehicles, not their drivers.<sup>91</sup> Some motorists have more than one insurable vehicle, and may insure one, but not another.<sup>92</sup> In fact, owners of as many as 41% of uninsured vehicles report that the car, truck or van is uninsured because it is either “not in operating condition” or “runs but . . . is not being used.”<sup>93</sup> Arguably, these owners should not be included within the uninsured motorist category, since they claim their vehicles are not on the road. How this “hybrid” person or his or her vehicle is considered in the various models can make a significant, if not dramatic, difference in the calculation of the number of uninsured drivers.<sup>94</sup>

The variety of required auto insurance is interesting in and of itself. There are at least thirteen kinds of automobile insurance.<sup>95</sup> Individual states’ political processes and investigations have apparently led legislatures to reach very different conclusions as to the appropriate type of policy, minimum policy limits, methods of enforcement, and

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87. Khazzoom, *supra* note 79, at 73–78.

88. AAMVA UNINS. MOTOR VEHICLE RATE WORKING GRP., *supra* note 84, at 3; Khazzoom, *supra* note 79, at 75.

89. AAMVA UNINS. MOTOR VEHICLE RATE WORKING GRP., *supra* note 84, at 2–3.

90. *Id.* at 5–9.

91. Khazzoom, *supra* note 79, at 61.

92. *Id.* at 62.

93. Khazzoom, *supra* note 79, at 88.

94. See, e.g., AAMVA UNINS. MOTOR VEHICLE RATE WORKING GRP., *supra* note 84, at 5, 7; LYN HUNSTAD, CAL. DEP’T OF INS., CHARACTERISTICS OF UNINSURED MOTORIST 1–2 (Feb. 1999), available at <http://www.insurance.ca.gov/0400-news/0200-studies-reports/0600-research-studies/auto-policy-studies/upload/Characteristics-of-Uninsured-Motorist.pdf>.

95. *Types of Auto Insurance Coverage*, AUTOINSURANCE.ORG, <http://www.autoinsurance.org/types-of-auto-insurance-coverage/> (last visited Feb. 25, 2013).

range of penalties in its mandatory insurance requirements.<sup>96</sup> The variety of mandated insurance among states ranges from no requirement at all for those who have not previously had an accident in which they were at fault to no-fault coverage.<sup>97</sup>

Basic liability insurance is the most commonly mandated auto coverage, which covers damages to another's property caused by the driver of the insured auto.<sup>98</sup> It does not repair or replace the auto driven by the insured.<sup>99</sup> The two general components of liability insurance are categorized in the industry as bodily injury and property damage.<sup>100</sup> State laws also specify a minimum amount of coverage as a three-digit series, stating the amount of coverage for personal injury per person, maximum personal injury for all injured, and property damage.<sup>101</sup> Mandatory minimums range (in thousands) from \$12.5/\$25/\$7.5 in Ohio to \$50/\$100/\$25 in Maine.<sup>102</sup>

In so-called “no-fault states,” a trend in the 1970s that has largely been reversed, owners purchase auto insurance that provides coverage for their own vehicle, its driver, and passengers, regardless of who was at fault in the accident.<sup>103</sup> Today, many no-fault states mandate that auto owners maintain insurance coverage, even though it applies only to their own vehicle rather than another driver's.<sup>104</sup> Uninsured or underinsured motorist auto insurance (UM/UMI) covers damages and losses of

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96. See *supra* note 72 and accompanying text.

97. For an interesting comparison of the requirement to carry UM/UMI or no-fault auto insurance with the Affordable Care Act's tax levied against the uninsured, see Jennifer B. Wiggins, *Is the Health Insurance Individual Mandate “Unprecedented”? The Case of Auto Insurance Mandates* (Apr. 6, 2012) (unpublished working paper), available at <http://ssrn.com/abstract=2011025>.

98. WASH. STATE OFFICE OF THE INS. COMM'R, *supra* note 24, at 2; *Compulsory Auto/Uninsured Motorists*, *supra* note 77 (“Virtually all states require drivers to have auto liability insurance before they can legally drive a motor vehicle.”).

99. WASH. STATE OFFICE OF THE INS. COMM'R, *supra* note 24, at 2 (comparing “[l]iability” with “[c]ollision coverage” and “[c]omprehensive coverage”).

100. *Id.*

101. See *Compulsory Auto/Uninsured Motorists*, *supra* note 77; see also, e.g., WIS. STAT. § 344.01(2)(d) (2011–2012) (requiring Wisconsin drivers to have insurance covering \$25,000 for personal injury per person, \$50,000 for personal injury of all people injured, and \$10,000 for property damage).

102. See *Compulsory Auto/Uninsured Motorists*, *supra* note 77.

103. No-fault insurance was instituted in a number of states during the 1970s, and was proposed and tried as a response to concerns on tort litigation. See Harrington, *supra* note 70, at 116; *No-Fault Auto Insurance*, INS. INFO. INST. (Jan. 2013), [http://www.iii.org/issues\\_updates/no-fault-auto-insurance.html](http://www.iii.org/issues_updates/no-fault-auto-insurance.html).

104. Harrington, *supra* note 70, at 116.



vehicle owners who suffer personal injury or property damage due to the fault of an uninsured or underinsured motorist.<sup>105</sup> Some twenty-one states require vehicle owners to maintain UM/UMI insurance in addition to liability, in effect compelling the purchase of self-insurance for those vehicles in such circumstances.<sup>106</sup>

Likewise, states chose a wide range of enforcement tactics and penalties for noncompliance, from fines to impoundment or imprisonment.<sup>107</sup> Insurance companies claim that the cost to states of enforcing these laws or of required reporting systems,<sup>108</sup> ultimately passes to the insured through rate increases and higher registration and licensing fees. Many states require proof of insurance for vehicle registration,<sup>109</sup> but owners can easily drop the insurance once registration is complete, and short of direct communication with the insurance carrier itself, it is difficult or impossible for an enforcement officer to know if a vehicle's coverage has lapsed. Systems to monitor insurance coverage and enforce these laws cannot only be expensive, but if unreliable or out of date, can unnecessarily penalize those in full compliance.<sup>110</sup>

### *C. The Disjunction Between FEMA's IVINS Rule and State Insurance Mandates*

Despite its comment that vehicles must meet "the terms of state law" to be eligible for aid, in practice, FEMA does not appear to adopt the particular individual state law varieties of required insurance carriage, but simply requires proof of some form of liability insurance.<sup>111</sup> It is unclear whether it enforces this provision at all in the lone holdout on mandatory insurance, New Hampshire, which instead requires a financial responsibility payment only from those drivers who have been

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105. INS. RESEARCH COUNCIL, *supra* note 71, at 1.

106. See Harrington, *supra* note 70, at 116; *Compulsory Auto/Uninsured Motorists*, *supra* note 77.

107. Cole et al., *supra* note 72, at 615.

108. See, e.g., *Despite Compulsory Coverage Laws, Fight Against UMs Marches On*, *supra* note 34; *Mandatory Auto Insurance Does Not Reduce Number of Uninsured Drivers*, *Says Insurer Trade Group*, *supra* note 34.

109. AM. ASS'N OF MOTOR VEHICLE ADMIN., *supra* note 61, at 19, 25, 27 (noting that Alabama, Arkansas, and California, for example, all require proof of insurance upon vehicle registration).

110. See Knauf, *supra* note 34.

111. *Help After a Disaster: Applicant's Guide to the Individuals & Households Program*, *supra* note 23, at 15; *Why am I Not Eligible for Assistance?*, *supra* note 23.

at fault in at least one accident within the state.<sup>112</sup> It seems unlikely that the level of detail needed to be certain that an auto insurance policy both meets the state standards and is current—or was at the time of the disaster—is beyond what most FEMA aid application processing encompasses in the days and weeks following a major disaster.

Industry experts and scholars have examined the effect of mandatory insurance auto laws over time, and most studies indicate they have little to no real impact on the number of uninsured drivers, though there are some mixed conclusions. The industry has consistently opposed these laws; some industry publications quote executives' conclusions that compulsory or mandatory auto insurance rules are not successful in reducing the number or percentages of uninsured vehicles on our roads.<sup>113</sup> For example, Lynn Knauf, policy manager for the Alliance of American Insurers, states that "[m]andatory automobile insurance reporting programs have never been proven effective in reducing the percentage of uninsured drivers on the road."<sup>114</sup> The industry also complains that insurers bear the costs and burdens of complying with state regulations on insurance companies, particularly creation and maintenance of up-to-the-minute databases on policies in force.<sup>115</sup> Laura Kotelman, PCI regional manager and senior counsel, agrees: "[C]ompulsory auto insurance laws do not prevent uninsured drivers from owning or operating a vehicle, and are frequently a harassment to responsible drivers who do maintain coverage."<sup>116</sup>

Other examinations of the impact of mandatory auto insurance reach somewhat conflicting conclusions. A study attempting to

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112. N.H. REV. STAT. ANN. § 264:20 (2012).

113. Some industry analysts believe mandatory insurance laws actually punish insured drivers by increasing overall costs while having little effect on the number of insured vehicles. See Knauf, *supra* note 34. Knauf explains:

Worst of all, insured drivers end up "paying" in three ways: they pay for their own insurance protection (which includes protection in the event of an accident caused by an uninsured driver); they pay increased insurance costs; and they often pay higher registration and licensing fees as the exorbitant costs of these mandatory insurance enforcement programs are ultimately passed to them.

*Id.* Knauf was the policy manager of the Alliance of American Insurers at the time of her statement. *Id.*

114. Knauf, *supra* note 34.

115. *Id.*; *Mandatory Auto Insurance Does Not Reduce Number of Uninsured Drivers, Says Insurer Trade Group*, *supra* note 34.

116. *Mandatory Auto Insurance Does Not Reduce Number of Uninsured Drivers, Says Insurer Trade Group*, *supra* note 34.

correlate severity of possible penalties for noncompliance with improvements in compliance rates found a positive correlation between stiff penalties and compliance.<sup>117</sup> One study found a correlation between more stringent enforcement of mandatory insurance laws and lower levels of uninsured motorist claims.<sup>118</sup> The same study found support for the corresponding theory that states with more lax laws have higher levels of uninsured motorists, but also found demographic and price factors to be an influence.<sup>119</sup> Another found that states with mandatory insurance laws may experience reduced levels of uninsured motorists, but also found that these drivers have an increased rate of involvement in auto accident fatalities, which it attributes to a “moral hazard” effect (the insured’s expectation of lower accident costs).<sup>120</sup> At least one insurance economist doubts whether the overall effect of such laws actually reduce the costs of auto accidents overall.<sup>121</sup>

More severe penalties do not necessarily translate to higher compliance with these laws either. A Tulsa, Oklahoma journalist reported that after his state increased penalties and imposed towing and impoundment for uninsured vehicles, there was no significant effect on the number of uninsured motorists, and the rate remained one of the highest in the country at 23.9%.<sup>122</sup> His source, IRC vice president David Corum, said the rate “appear[ed] to be related to the . . . economy.”<sup>123</sup> Several states have or are experimenting with different approaches to the problem of uninsured motorists, at least implicitly conceding that the present mandatory laws are not satisfactorily addressing the concern.<sup>124</sup> At best, these studies raise serious questions about the

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117. Cole et al., *supra* note 72, at 631–36. One flaw with this study noted by the author is the use of “average” penalties for violations of mandatory insurance laws. *Id.* For example, most people would acknowledge that a range of possible penalties from \$100 to \$5,000 is unlikely to result in an average penalty of \$2,540 ( $\$5,100 \div 2$ ) per infraction.

118. Yu-Luen Ma & Joan T. Schmit, *Factors Affecting the Relative Incidence of Uninsured Motorists Claims*, 67 J. RISK & INS. 281, 288 (2000).

119. *Id.* at 287–88, 290.

120. Alma Cohen & Rajeev Dehejia, *The Effect of Automobile Insurance and Accident Liability Laws on Traffic Fatalities*, 47 J.L. & ECON. 357, 360, 365, 373 (2004).

121. Harrington, *supra* note 70, at 134.

122. Omer Gillham, *State’s Uninsured Drivers Still Rank High*, TULSA WORLD (Sept. 14, 2011, 8:07 AM), [http://www.tulsaworld.com/news/article.aspx?subjectid=11&articleid=20110914\\_11\\_A13\\_CUTLIN385388](http://www.tulsaworld.com/news/article.aspx?subjectid=11&articleid=20110914_11_A13_CUTLIN385388).

123. *Id.*

124. Cassandra R. Cole & Kathleen A. McCullough, *A Review of Some Possible Solutions to the Uninsured Motorist Problem*, CPCU EJOURNAL (Nov. 2007), available at <http://web.ebscohost.com/ehost/pdfviewer/pdfviewer?sid=41179f63-2406-4460->

effectiveness of mandatory insurance laws to prevent uncompensated damage and injuries, and brings into question whether any purpose is served by FEMA's punitive actions postdisaster.

*D. Does the Insurance Mandate Discriminate Against Low Income Survivors?*

While there may be differences of opinion as to the value of mandatory auto insurance laws, there is no question that low- and moderate-income drivers comprise most of the ranks of uninsured motorists. These demographics have been consistent over time. In the IRC's profile of uninsured motorists developed from a survey in 1989, it found that motorists most likely to be uninsured were young, with low education, and renting their residences.<sup>125</sup> Significantly, it also found that motorists who earned less than \$7,500 per year owned 23% of registered vehicles, but accounted for 50% of uninsured vehicles.<sup>126</sup> The next level of those with incomes between \$7,500 and \$20,000 accounted for another 22% of uninsured motorists.<sup>127</sup> Motorists with \$20,000 or more in annual income owned 34% of registered vehicles but accounted for only 16% of uninsured vehicles.<sup>128</sup> Lyn Hunstad conducted a survey for the California Department of Insurance, published in 1999, and found almost identical demographics.<sup>129</sup> In 2000, Khazzoom summarized a number of sources of information on uninsured motorists<sup>130</sup> and reported that uninsured motorists are most likely to be young, low-income, minority males with low levels of education, most likely rent rather than own a home, to be unemployed or work part-time, and drive older model cars.<sup>131</sup> They are also more likely to have been involved in accidents,<sup>132</sup> which is likely to lead to more expensive insurance

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9988-7288bd7de83b%40sessionmgr104&vid=2&hid=114 (subscription required). A number of other methods of addressing the problem of uninsured vehicles have been proposed, including improvement of tracking and enforcement, low-cost auto policies, uninsured motorist coverage, so-called "no-pay, no-play" laws which preclude uninsured drivers from collecting for damages from insured drivers, and pay-at-the-pump strategies. *Id.*

125. ALL-INDUS. RESEARCH ADVISORY COUNCIL, UNINSURED MOTORISTS 29, 30 tbls.17, 18, 19 (1989).

126. *Id.* at 31 tbl.21.

127. *Id.*

128. *Id.*

129. HUNSTAD, *supra* note 94, at 2.

130. Khazzoom, *supra* note 79, at 82–86.

131. *Id.* at 85.

132. *Id.* Khazzoom's data highlights the demographics of uninsured motorists:

premiums.

A direct correlation alone does not necessarily mean that there is a causal effect between low-income drivers and lack of insurance. Inquiries and surveys seeking to discover why motorists do not insure their vehicles attempt to answer the question. Virtually every study of uninsured motorists leads to the same conclusion: people do not insure their vehicles for two primary reasons.<sup>133</sup> First, they do not, or rarely, use the vehicle, or second, they cannot afford insurance.<sup>134</sup> According to the IRC, over 80% of the owners of uninsured vehicles gave one of these reasons—41% citing nonuse and 41% citing inability to pay and

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Table 4 Profile of Uninsured Motorists

Age: Young Motorists between 18–29 own 28 percent of registered vehicles. Account for 52 percent of uninsured vehicles. Motorists 45 and over own 39 percent of registered vehicles. Account for 13 percent of uninsured vehicles.

Education: Low Motorists with less than a high school education own 17 percent of reg. vehicles. Account for 33 percent of uninsured vehicles. College grad or post grads own 23 percent of registered vehicles. Account for 11 percent of uninsured vehicles.

Residence: Rent Motorists renting residence own 26 percent of reg. vehicles. Account for 50 percent of uninsured vehicles. Motorists owning residence own 68 percent of reg. vehicles. Account for 40 percent of uninsured vehicles.

Job Status: Unemployed[/]Part-time Unemployed Motorists own 17 percent of registered vehicles. Account for 33 percent of uninsured vehicles. Retired motorists own 14 percent of registered vehicles. Account for 5 percent of uninsured vehicles.

Personal Inc[ome]: Low Motorists with less than \$7500 own 23 percent of reg. vehicles. Account for 40 percent of uninsured vehicles. Motorists with \$20,000 or more own 34 percent of reg. vehicles. Account for 16 percent of uninsured vehicles.

Gender: Mostly Male One estimate for CA showed 70 percent of [uninsured motorists] are male.

Car Age: Old [One e]xample from Texas[ showed] 58 percent drive cars more than 10 years old.

Ethnic: Minority Percent varies by state; [minorities] dominant in some [states,] such as CA, TX.

Driving Record: Evidence [of] Accident Proneness In 1990, CA percent [of uninsured motorists] was less than 28 percent; yet CHP data for [1988–1989 show that 55.1–60.9 percent of fatal accidents, 44.6 percent of bodily injury accidents, and 34.1 percent of traffic citations involved uninsured motorists].

*Id.* at 85 tbl.4 (formatting omitted).

133. HUNSTAD, *supra* note 94, at 2; Khazzoom, *supra* note 79, at 87–88.

134. HUNSTAD, *supra* note 94, at 2; Khazzoom, *supra* note 79, at 87–88.

high costs.<sup>135</sup> Arguably, vehicles that are not on the roads or highways are not involved in accidents, and do not contribute to the problem of uncompensated damage. Without these vehicles, the pool of uninsured drivers who plead inability to pay becomes much larger. In fact, if the unused vehicles are removed from the pool, nearly 70% of uninsured drivers who are using their vehicles claim to be unable to purchase insurance.<sup>136</sup> Of course, this number would be enhanced by those who may have simply elected not to have an automobile at all because they either cannot afford insurance or are deterred by the risk of penalties for failure to comply with the law. Industry studies and predictions also indicate that unemployment is a determinative factor in the uninsured auto rate, anticipating increases during recent years of economic hardship nationwide.<sup>137</sup> Both the Insurance Industry Institute and the IRC warned in 2009 that economic downturn and financial hardships would increase the percentage of uninsured vehicles.<sup>138</sup>

Economist Scott Harrington points out the rationality of low-income drivers' failure to insure.<sup>139</sup> There are few benefits for an investment in liability insurance for a poor family, in large part because insurance's purpose is to compensate others, not the insured. Low-income owners are less likely to own a home or have other significant assets, making the risk of the levy of a collectible judgment for damage to another's car far less likely.<sup>140</sup> Many uninsured autos are older makes and models,<sup>141</sup> so insuring them comprehensively or against collision is less advantageous. If injured, Medicaid likely covers low-income parties' hospital and medical costs.<sup>142</sup> All in all, the risks of being uninsured are so low as to

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135. HUNSTAD, *supra* note 94, at 5 ("The primary reasons given for not insuring the vehicle were: vehicle not in operating condition (24%), [cannot] afford to buy it (21%), premiums were too high (20%), and vehicle runs but is not being used (17%)."); Khazzoom, *supra* note 79, at 87–88.

136. Khazzoom, *supra* note 79, at 87–88.

137. News Release, Ins. Research Council, Economic Downturn May Push Percentage of Uninsured Motorists to All-Time High (Jan. 21, 2009) [hereinafter News Release], available at [http://www.insurance-research.org/sites/default/files/downloads/IRC\\_UM\\_012109.pdf](http://www.insurance-research.org/sites/default/files/downloads/IRC_UM_012109.pdf).

138. *III. Sees More Uninsured Drivers as Financial Hardships Loom*, INS. ADVOC., Feb. 23, 2009, at 14–15; News Release, *supra* note 137.

139. Harrington, *supra* note 70, at 119–20.

140. Stephen Brobeck & J. Robert Hunter, *Lower-Income Households and the Auto Insurance Marketplace: Challenges and Opportunities*, CONSUMER FED'N AM. (Jan. 30, 2012), <http://www.consumerfed.org/news/450>.

141. HUNSTAD, *supra* note 94, at 6.

142. Harrington, *supra* note 70, at 116.

justify that economic choice.<sup>143</sup>

To further complicate matters, the Consumer Federation of America (CFA)<sup>144</sup> concluded in a study released in January 2012 that the auto insurance rates reflect disparate treatment and impacts on low-to-middle income (LMI) individuals.<sup>145</sup> It estimates that perhaps as many as one-fifth to one-third of low-to-middle income households—defined as earning \$20,000 or less per year and \$40,000 or less, respectively—do not have auto insurance and are operating their vehicles illegally.<sup>146</sup> Insurance companies are forbidden to use income as a rating factor for those seeking insurance, but the authors of this study determined that proxies for income have become more prevalent, permitting indirect discrimination on the basis of wealth.<sup>147</sup> Among other practices discovered that militate against LMI drivers obtaining insurance are the lack of access by lower income families to insurance agencies and offices;<sup>148</sup> inability to purchase insurance from some major insurers;<sup>149</sup> being charged higher premiums for less coverage;<sup>150</sup> being charged

143. Cohen & Dehejia, *supra* note 120, at 361 (citing, e.g. Gur Huberman et al., *Optimal Insurance Policy Indemnity Schedules*, 14 BELL J. ECON. 415 (1983)); Brobeck & Hunter, *supra* note 140 (noting that liability insurance provides “little if any direct benefit[]”).

144. *About CFA: Overview*, CONSUMER FED’N AM., <http://www.consumerfed.org/about-cfa/overview> (last visited Jan. 31, 2013) (explaining that “The Consumer Federation of America (CFA) is an association of nonprofit consumer organizations that was established in 1968 to advance the consumer interest through research, advocacy, and education. Today, nearly 300 of these groups participate in the federation and govern it through their representatives on the organization’s Board of Directors.”).

145. Brobeck & Hunter, *supra* note 140; *CFA Releases Study on Economic Harm to LMI Households from Over Price Auto Insurance*, CONSUMER FED’N AM. (Jan. 30, 2012), <http://www.consumerfed.org/news/451>.

146. Brobeck & Hunter, *supra* note 140.

147. *Id.*

148. *Id.*

Research suggests that those in LMI urban communities have much less access to auto insurance offices than do those in higher-income areas. For example, in the District of Columbia, of [eighty] insurance offices identified, only three were located in the two wards with the lowest incomes while [forty-five] were located in the two wards with the highest incomes.

*Id.*

149. *Id.* “Some major insurers will not even sell auto insurance to certain types of car owners” or they charge rates that are so much higher than those of most other insurers that they clearly are not serious about selling these policies. *Id.*

150. *Id.* In at least several states including Arizona, Texas, and Arkansas, and probably in more, “some major insurers charge [individual consumers] lower premiums for standard [liability coverage] than for minimum liability coverage. It appears that these insurers are discriminating against purchasers of the minimum coverage, who are disproportionately LMI



higher premiums because of rating factors beyond their control such as age, gender, and zip code;<sup>151</sup> being charged higher premiums because key rating factors are largely ignored;<sup>152</sup> being charged very high premiums for force placed coverage;<sup>153</sup> and being treated unfairly in the claims process.<sup>154</sup>

Combining the information to consider the effects on the willingness and ability of low-income auto owners to purchase auto liability insurance, we can see a disturbing confluence of problems. The reasons for lack of compliance with the laws are many, and the cost is one of the most problematic. Liability insurance ranges from around \$700 to thousands per year.<sup>155</sup> Possible discrimination against the poor only exacerbates that effect. As a result of all of these factors, those with vehicles of relatively little value and few assets have little incentive to incur the expense of auto insurance.

### III. STAFFORD ACT PROHIBITION ON ECONOMIC STATUS DISCRIMINATION AND FEMA'S IVINS RULE

#### Economic discrimination in conducting disaster response policy and

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car owners." *Id.*

151. *Id.*

In general, LMI car owners are disadvantaged by rate classification systems used by insurers. They pay higher premiums because insurers use rating factors, such as [location of] residence, occupation, education, and credit rating, which [they claim] are often correlated with risk. But insurers often have not adequately demonstrated to regulators that these correlations exist or that they actually [adequately] reflect risk . . . .

*Id.* Some of these factors, individually and in aggregate, may be "surrogates for income," a factor forbidden from use in all states. *Id.*

152. *Id.* "One important factor" not adequately taken into account by rating systems, to the detriment of LMI families, is miles driven annually. *Id.* "LMI car owners drive far fewer miles annually than do higher-income owners—about half the miles of those in the top income quintile but the lower risks associated with fewer miles driven are not adequately recognized by rating systems." *Id.*

153. *Id.* "Collision and comprehensive coverage purchased by auto lenders for borrowers without this coverage is . . . expensive because, as they do for most types of credit insurance[,] lenders charge insurers large commissions that effectively represent "kickbacks." *Id.* "These commissions are the main reason that, according to one study, loss ratios on forced place coverage [the percentage of premiums dollars paid out in claims] averaged [twenty-five] percent, well below the industry average of more than [sixty] percent." *Id.*

154. *Id.* "To quote one plaintiff's attorney who used to work for insurers, 'it's easier [to deny claims to] the sick, the weak, and the poor than [to] someone who is big and tough.'" *Id.*

155. *Id.*

actions is expressly prohibited in the Stafford Act.<sup>156</sup> Concerns about how low-income individuals and families might fare in disaster situations appear in the legislative history of the federal disaster response at least as early as 1973.<sup>157</sup> In a report to Congress at that time from a special taskforce appointed to revamp the Disaster Preparedness Act under the Nixon administration, the authors make clear a concern that the “needy” are especially vulnerable to disaster and may not qualify for disaster loans available to those of more means.<sup>158</sup> The legislative history of federal disaster legislation continues to reflect this concern.<sup>159</sup> The result is expressly evident in 42 U.S.C. § 5151, where economic status is given equal weight with protections for discrimination on the basis of race, gender, and national origin.<sup>160</sup> The statement is repeated in FEMA’s regulations, providing that aid requests and responses shall be accomplished without discrimination on the grounds of “race, color, religion, nationality, sex, age, disability, English proficiency, or economic status,” similar language has appeared in disaster response legislation since the 1970s.<sup>161</sup> If data supports the premise that a policy requiring liability auto insurance discriminates against those of low and moderate income, FEMA’s insurance requirement may well violate this provision.

*A. Possible Challenges to the Mandatory Liability Insurance Requirement by FEMA*

FEMA has acknowledged that, in its own words, “people who are economically disadvantaged will always be more in need of federal disaster assistance,” but made the point that this inevitable fact does not mean its actions are discriminatory.<sup>162</sup> To date, it appears that no court

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156. 42 U.S.C. § 5151(a) (2006 & Supp. V 2011).

157. See, e.g., *To Investigate the Adequacy and Effectiveness of Federal Disaster Relief Legislation Part 5*, *supra* note 50, 168 (statement of George M. Elsey, President, American National Red Cross).

158. H.R. DOC. NO. 93-100, at 12 (1973).

159. See *supra* notes 42–62 and accompanying text.

160. 42 U.S.C. § 5151(a).

161. *Id.*; see Disaster Relief Act of 1974, Pub. L. No. 93-288, § 311, 88 Stat. 143, 150 (“[R]elief and assistance activities shall be accomplished in an equitable and impartial manner, without discrimination on the grounds of race, color, religion, nationality, sex, age, or economic status.”).

162. *McWaters v. FEMA (McWaters II)*, 436 F. Supp. 2d 802, 824 (E.D. La. 2006) (quoting Defendant’s Post-Trial Brief at 3, *McWaters II*, 436 F. Supp. 2d 802 (No. 05-5488), 2006 WL 703656, which reads: “[P]eople who are economically disadvantaged will always be

has found that any FEMA policy or decision is in violation of its nondiscrimination provision.

An individual or group, or more likely a pro bono organization on its behalf, who wishes to have FEMA alter or reconsider the auto insurance qualification, would face a number of legal hurdles. A court action would first face jurisdictional and immunity issues.<sup>163</sup> Sovereign immunity, as any law student can explain, prevents legal action against government actors unless the government has expressly given its consent to be subject to review,<sup>164</sup> and a suit against any federal agency or a federal official acting in an official capacity is a suit against the sovereign.<sup>165</sup> Furthermore, FEMA is protected by a Stafford Act provision that articulates its own nonliability protection.<sup>166</sup> Section 5148 of the Act states that the government “shall not be liable for any claim based upon the [agency’s] exercise or performance of, or a failure to exercise or perform a discretionary function or duty.”<sup>167</sup> The identical language appears in its regulations.<sup>168</sup> Stated in the affirmative, the provision asserts protection from liability for agency actions in carrying out discretionary functions.<sup>169</sup>

A review of recent cases suggests the government has taken a very broad view of what FEMA actions are “discretionary” so as to fall within the protections, at times arguing that FEMA has a unique position due to its particular mission and claiming a different standard

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more affected by a disaster than other persons, and will always be more in need of federal disaster assistance”).

163. *See generally* *Humphries v. Various Fed. USINS Emps.*, 164 F.3d 936, 941 (5th Cir. 1999).

164. *See generally* DONALD L. DOERNBERG, *SOVEREIGN IMMUNITY OR THE RULE OF LAW: THE NEW FEDERALISM’S CHOICE* 79–80 (2005).

Sovereign immunity in the United States today has two functions. First, it disables individuals (wholly or partially) from seeking relief from a governmental entity for unlawful harm done or threatened. . . .

Second, the Supreme Court has instructed that sovereign immunity upholds the dignity interest of a sovereign in not being summoned either into its own courts or into the courts of some other sovereign.

*Id.*

165. 42 U.S.C. § 5148 (2006 & Supp. V 2011).

166. *Id.*

167. *Id.*

168. 44 C.F.R. § 206.9 (2011).

169. *Graham v. FEMA*, 149 F.3d 997, 1005 (9th Cir. 1998) (“This provision ‘preclude[s] judicial review of all disaster relief claims based upon the discretionary actions of federal employees.’” (quoting *Rosas v. Brock*, 826 F.2d 1004, 1008 (11th Cir. 1987))).

of discretionary acts than that applied to other federal agency actions operating with similarly functioning protections.<sup>170</sup>

Several courts have had the opportunity to consider challenges to FEMA decisions, practices, and policies under various theories of liability and with consideration of a government immunity defense.<sup>171</sup> The most likely sources of authority for judicial review of the mandatory insurance provision are: (1) violation of FEMA's statutory provisions; (2) the Administrative Procedures Act; or (3) constitutional violations.<sup>172</sup> Examination of each of these theories and the guidance and rules emerging from courts addressing individuals' challenges to FEMA action (or inaction) is instructive in determining the parameters of jurisdiction and standards of review applied to this particular agency's policies and practices.

### *B. The Scope of FEMA Nonliability*

The Stafford Act provides that the government "shall not be liable for any claim based upon the [agency's] exercise or performance of, or a failure to exercise or perform a discretionary function or duty."<sup>173</sup> Courts are directed to consider the nature of the activity carried out by the agency or its agent, not the identity of the actor, in determining whether a particular challenge is appropriate for judicial review.<sup>174</sup> What constitutes a "discretionary function or duty" establishes the parameters for the judicial jurisdiction over nonmonetary challenges to FEMA.<sup>175</sup> Like other agencies, the basic parameters of FEMA's sovereign immunity protect it not only from liability, but from the requirement of defending its actions at all.<sup>176</sup> Procedurally, these become determinations of whether a court has jurisdiction to entertain the action claim heard as a motion to dismiss.<sup>177</sup> Defining what is

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170. See, e.g., *Graham*, 149 F.3d at 1006.

171. See, e.g., *Goldberg v. Kelly*, 397 U.S. 254, 255 (1970) (addressing constitutional violations); *St. Tammany Parish v. FEMA*, 556 F.3d 307, 318 (5th Cir. 2009) (alleging violations of FEMA's statutory provisions); *Graham*, 149 F.3d at 1000 (suing under the Administrative Procedure Act).

172. See, e.g., *supra* note 171.

173. 42 U.S.C. § 5148 (2006 & Supp. V 2011) (restated in 44 C.F.R. § 206.9).

174. See, e.g., *United States v. S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines)*, 467 U.S. 797, 813 (1984).

175. See, e.g., *St. Tammany Parish*, 556 F.3d at 317–18.

176. *Id.* at 318.

177. *Id.* at 315 n.3.

discretionary and what is not has been the cornerstone to jurisprudence assessing when a court has jurisdiction to hear a challenge to an agency action.<sup>178</sup> Therefore, the essential initial inquiry in a request for judicial review of a FEMA policy, such as the auto liability insurance mandate, is whether it is a discretionary act to establish and enforce that eligibility requirement.<sup>179</sup> If Congress granted FEMA that authority, a court cannot properly reach the merits of the claim.<sup>180</sup>

#### 1. FTCA Precedent and FEMA's "Propinquity" Standard

FEMA has aggressively asserted a broad interpretation of the nonliability immunity defense in motions to dismiss since the earliest challenges to its actions.<sup>181</sup> Recently, it has taken the position that judicially created standards applied to other agencies under the Administrative Procedures Act (APA) and the Federal Tort Claims Act (FTCA), both long used as precedent, are inapplicable to it.<sup>182</sup> Moreover, FEMA contends that the Stafford Act intended a different definition of "discretionary" to apply to FEMA.<sup>183</sup> So far, courts have declined to accept these arguments, but while the boundaries of FEMA's nonliability provision have been addressed in district courts and certain courts of appeals, the holdings have not directly addressed the arguments and decisions have been limited to the facts of the cases

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178. *Id.* at 318–19.

179. *See, e.g., id.* at 310.

180. *Id.* at 326 n.13.

181. *See, e.g.,* *Graham v. FEMA*, 149 F.3d 997, 1005 (9th Cir. 1998).

182. *St. Tammany Parish*, 556 F.3d at 313–14.

183. *Id.* at 318–19; *Ornellas v. United States*, 2 Cl. Ct. 378, 380 (1983). The *Ornellas* court relied on the following statement as evidence of Congress's intent to bar all claims regarding disaster relief:

We have further provided that if the agencies of the Government make a mistake in the administration of the Disaster Relief Act that the Government may not be sued. Strange as it may seem, there are many suits pending in the Court of Claims today against the Government because of alleged mistakes made in the administration of other relief acts, suits . . . because citizens have averred that the agencies and employees of Government made mistakes. We have put a stipulation in here that there shall be no liability on the part of the Government.

*Ornellas*, 2 Cl. Ct. at 380 (quoting 96 CONG. REC. 11,912 (1950) (statement of Rep. Whittington)). The statement came from debates regarding the Disaster Relief Act of 1950, in which the discretionary function exception first appeared. *See* Disaster Relief Act of 1950, Pub. L. No. 81-875, § 3, 64 Stat. 1109, 1110. The court took this statement to mean Congress "inten[ded] to raise a statutory barrier to judicial review." *Ornellas*, 2 Cl. Ct. at 380.

before the courts.<sup>184</sup> Consequently, this argument may continue to appear in subsequent FEMA litigation.<sup>185</sup>

The government first took this unprecedented position in 2006 post-Hurricane Katrina litigation. It objected to the use of FTCA analysis to determine what constituted discretion given to an agency by Congress, claiming that FEMA's unique mission to respond to disaster required application of a unique standard.<sup>186</sup> The government asserted that FEMA's immunity from suit was not coterminous with that proscribed under the FTCA, and that it should be subject to a different—presumably much broader—standard of “propinquity” to the disaster or emergency.<sup>187</sup> “Propinquity,” defined by Merriam-Webster as “nearness in place; proximity . . . nearness in time,”<sup>188</sup> would require courts to take into consideration the context of disaster response decisions. The government contended that the Stafford Act vests the United States with full discretion in its provision of disaster assistance, leaving the courts only to determine whether the conduct complained of occurred in the course of carrying out the agency's charge.<sup>189</sup> If the court agreed, FEMA would not be subject to judicial review for any actions taken in conducting disaster relief.<sup>190</sup> FEMA made the argument simultaneously in two cases pending in the Fifth Circuit, although in both cases it first raised the issue on appeal.<sup>191</sup> The government, though it acknowledged that the plain language of the statute limited immunity to “discretionary function[s] or dut[ies],” took the position that Congress intended FEMA to have a far greater, basically unfettered, immunity from judicial review than other agencies when acting in response to a disaster.<sup>192</sup>

The Fifth Circuit claimed that it would not address the argument

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184. See, e.g., *In re World Trade Ctr. Disaster Site Litig.*, 521 F.3d 169, 175 (2d Cir. 2008).

185. *Id.* at 188.

186. *Id.* at 195–97.

187. *St. Tammany Parish*, 556 F.3d at 319.

188. MERRIAM-WEBSTER'S UNABRIDGED DICTIONARY 1551 (2011).

189. Brief for Appellees at 10–11, *St. Tammany Parish*, 556 F.3d 307 (No. 08-30070), 2008 WL 6122721 (“[T]he essential inquiry for the court is whether the actions (or inactions) complained of occurred in the course of ‘carrying out the provisions of [the Stafford Act].’ If it does, sovereign immunity should bar the claim.” (citation omitted)).

190. *Id.* at 11.

191. *Id.*; *St. Tammany Parish*, 556 F.3d at 319 n.7; see also *Freeman v. United States*, 556 F.3d 326, 336, 339 (5th Cir. 2009).

192. Brief for Appellees, *supra* note 189, at 10–11.

since it had not been made to the trial court, but made clear that it did not agree to adopt a new standard.<sup>193</sup> The opinion in *St. Tammany Parish* declined to directly address the statutory interpretations relied on by the government to support its new interpretation of § 5148, but dismissed the government's merits by holding that "discretionary function or duty" has the same meaning in both the Stafford Act and the FTCA.<sup>194</sup> The opinion quotes the identical relevant language of the two provisions,<sup>195</sup> the legislative history evidencing that Congress intended to adopt the FTCA standard, and other courts of appeals applying the FTCA case law in FEMA cases.<sup>196</sup> It found no difference in application to the case before it or reason to depart from the traditional analysis.<sup>197</sup> The decision comports with every court to date that has addressed FEMA's defense of protection under the "discretionary action" exception by applying the standard and precedent developed in interpretations of the FTCA.<sup>198</sup> The circuits that have addressed this issue have expressly used this standard, and none has rejected it.<sup>199</sup> Plaintiffs can be relatively confident that they will continue to do so, despite any novel arguments to the contrary from the government.

## 2. Administrative Procedures Act Application

The Administrative Procedures Act (APA) has also been relied upon by those seeking injunctive or other nonmonetary relief from FEMA.<sup>200</sup> As it did specifically in the Stafford Act for FEMA, Congress generally waived sovereign immunity for nondiscretionary agency action via a 1976 amendment to the APA.<sup>201</sup> According to § 701(a) of the APA, federal agencies' actions or inactions are subject to judicial review

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193. *St. Tammany Parish*, 556 F.3d at 319 n.7.

194. *Id.* at 319.

195. *Id.* at 320 ("Compare [42 U.S.C.] § 5148 (exempting claims based on 'the exercise or performance of or the failure to exercise or perform a discretionary function or duty'), with [28 U.S.C.] § 2680(a) (exempting claims based on 'the exercise or performance or the failure to exercise or perform a discretionary function or duty').").

196. *St. Tammany Parish*, 556 F.3d at 320.

197. *Id.*

198. *E.g., id.* at 320 & n.8. The FTCA statute was originally enacted as Title IV of the Legislative Reorganization Act of 1946, Pub. L. No. 79-601, §§ 401-42, 60 Stat. 812, 842-47, and is now codified at 28 U.S.C. § 1346(b) (2006 & Supp. V 2011).

199. *St. Tammany Parish*, 556 F.3d at 319-20.

200. *E.g., City of San Bruno v. FEMA*, 181 F. Supp. 2d 1010, 1013 (N.D. Cal. 2001).

201. Act of Oct. 21, 1976, Pub. L. No. 94-574, 90 Stat. 2721 (codified as amended at 5 U.S.C. §§ 702-703 (2006)).



unless “(1) statutes preclude judicial review; or (2) agency action is committed to agency discretion by law.”<sup>202</sup> In practical effect, the statute creates a parallel to FEMA’s and FTCA’s provisions, and, again, results in the need for a court to consider whether the agency action was “discretionary” before affirming its jurisdiction.<sup>203</sup>

The government has also disputed jurisdiction for judicial review of FEMA activity via the APA, claiming that FEMA falls within the exception created in part one of § 701(a).<sup>204</sup> It argued in *McWaters v. FEMA (McWaters II)* that the APA’s waiver of sovereign immunity does not apply to FEMA because § 5148 of the Stafford Act acts independently to “preclude judicial review” of the actions about which plaintiffs complained.<sup>205</sup> No court has specifically reached the issue, yet, of whether the parameters of the APA and FEMA are completely coterminous, but one federal district court held that, having determined that the functions and duties rendered by FEMA under the Stafford Act were “discretionary” pursuant to its § 5148, the APA was inapplicable.<sup>206</sup> Given the precedent on the application of FTCA immunity analysis to FEMA, and the fact that the two standards are so similar in meaning, it seems very unlikely that a court would find that a different standard applied to determining whether a FEMA action was discretionary under the APA as opposed to the Stafford Act. If those definitions remain the same, plaintiffs need not attempt to rely on the APA, and the pursuit of a claim under the APA is simply redundant in regard to the treatment of discretionary acts, though it may have application elsewhere in a challenge to a FEMA process.

Moreover, before a court can consider whether an action challenged pursuant to the APA is discretionary, the decision must be “final” in order to be reviewed in the courts.<sup>207</sup> Until a final agency action has

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202. 5 U.S.C. § 701(a) (2006).

203. *McWaters II*, 436 F. Supp. 2d 802, 825 (E.D. La. 2006).

204. Reply Memorandum in Support of Defendants’ Motion to Dismiss at 2, *McWaters II*, 436 F. Supp. 2d 802 (No. 05-5488), 2006 WL 638603.

205. *McWaters II*, 436 F. Supp. 2d at 825.

206. *Id.*

207. 5 U.S.C. § 704 (2006). Section 704 reads:

Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review. A preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final is final for the

been undertaken, the agency presumably still has authority to resolve the matter, leaving a court without jurisdiction.<sup>208</sup> FEMA used this rationale to assert in some actions that plaintiffs must exhaust their administrative remedies before seeking a court's review.<sup>209</sup>

In *Lockett v. FEMA*, the government asserted a “failure to exhaust administrative remedies” defense, arguing that the plaintiffs’ claims were not final because they had not appealed their individual decisions pursuant to the Stafford Act.<sup>210</sup> The *Lockett* court found that, unlike many other agencies, the Stafford Act provides FEMA applicants with only an informal procedure and permissive opportunity for appeals with no formal adjudication or process for review.<sup>211</sup> It relied on the United States Supreme Court decision in *Darby v. Cisneros*,<sup>212</sup> which explained that an agency may avoid the finality of an initial administrative decision only if it satisfies dual factors. The agency must have adopted a rule that an appeal be taken before judicial review is available and the rule must provide that the initial decision is inoperative pending appeal.<sup>213</sup> Otherwise, the initial decision becomes final and the aggrieved party is entitled to judicial review.<sup>214</sup> Because the Stafford Act’s appeal procedure does neither,<sup>215</sup> exhaustion of remedies is not required before seeking court review of an initial FEMA denial.<sup>216</sup>

#### IV. THE DIFFICULTIES OF MAKING A SUCCESSFUL CHALLENGE TO THE FEMA’S IVINS RULE

##### A. Discretionary Act?

Presumably, under current case law, a court entertaining an action against FEMA would apply the well-established test stated in *Berkovitz*

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purposes of this section whether or not there has been presented or determined an application for a declaratory order, for any form of reconsideration, or, unless the agency otherwise requires by rule and provides that the action meanwhile is inoperative, for an appeal to superior agency authority.

*Id.*

208. *In re World Trade Ctr. Disaster Site Litig.*, 521 F.3d 169, 178–79 (2d Cir. 2008).

209. *See, e.g., Lockett v. FEMA*, 836 F. Supp. 847, 851 (S.D. Fla. 1993).

210. *Id.* at 851–52.

211. *Id.* at 853.

212. *Darby v. Cisneros*, 509 U.S. 137, 154 (1993).

213. *Lockett*, 836 F. Supp. at 852–53.

214. *Id.* at 853.

215. *See* 44 C.F.R. § 206.101(m)(1) (2011).

216. *Lockett*, 836 F. Supp. at 853.

*v. United States* to determine what actions, practices, and policies fall within its discretionary activities.<sup>217</sup> In *Berkovitz*, the Court established a two-pronged approach for this determination.<sup>218</sup> First, the court examines whether a “choice or judgment” is involved in the performance of the agency function, and looks to see if that choice or judgment is “not tempered by a statute, regulation or policy which mandates a particular course of action.”<sup>219</sup> If agency action is constrained in some fashion, it is mandatory, not discretionary, and not immune from suit.<sup>220</sup> If the first prong is satisfied, then a second prong questions whether the activity in question is grounded in social, economic, or political activity.<sup>221</sup> If the second prong is also satisfied, the agency had discretionary authority over the decision, and its action is outside the waiver of sovereign immunity and not subject to judicial review.<sup>222</sup>

For guidance, a frequently relied upon United States Supreme Court case clarifying and summing up the application of the *Berkovitz* standard is found in *United States v. Gaubert*.<sup>223</sup> The *Gaubert* court articulated the purpose of the discretionary function exception as intended to “prevent judicial ‘second-guessing’ of legislative and administrative decisions grounded in social, economic, and political policy through the medium of an action in tort.”<sup>224</sup> The Court clarified that not only did the challenged act involved need to be nonmandatory, but that even discretionary actions must clearly satisfy the second *Berkovitz* prong and be “grounded in the policy of the regulatory regime,” in order to escape the waiver of sovereign immunity provided by the discretionary function exception.<sup>225</sup> The scrutiny suggested in this inquiry is tempered, however, by a presumption that an agency’s or an agent’s acts are grounded in policy whenever exercising the discretion

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217. *Berkovitz v. United States*, 486 U.S. 531, 536 (1988).

218. *Id.* at 536–37.

219. *See McWaters II*, 436 F. Supp. 2d 802, 809 (E.D. La. 2006) (citing *Berkovitz*, 486 U.S. at 536–37).

220. *Berkovitz*, 486 U.S. at 544.

221. *Id.* at 537; *see also McWaters II*, 436 F. Supp. 2d at 809.

222. *See McWaters II*, 436 F. Supp. 2d at 812.

223. *United States v. Gaubert*, 499 U.S. 315, 322–23 (1991).

224. *Id.* at 323 (quoting *United States v. Empresa de Viacao Aerea Rio Grandense (Varig Airlines)*, 467 U.S. 797, 814 (1984)).

225. *Id.* at 325, 328–29.

granted by Congress.<sup>226</sup>

To analyze whether a court might view the policy decision of mandatory auto liability insurance by FEMA as a discretionary function, a court would first consider the statute and regulations regarding “financial assistance . . . to address . . . other necessary expenses or serious needs,” under which aid for transportation falls, to see if a “judgment or choice” is involved.<sup>227</sup> Case law makes clear that there is no question that decisions to grant or deny disaster aid pursuant to FEMA policy are discretionary.<sup>228</sup> FEMA’s statutes give it the authority to establish eligibility standards and to make determinations of who meets its established criteria.<sup>229</sup> The Stafford Act provisions pertaining to individual and household aid are replete with the language of discretion.<sup>230</sup> The lacing of aid provisions with permissive language has led courts to frequently characterize awards of disaster financial assistance from FEMA as “gratuitous.”<sup>231</sup> As the Ninth Circuit held, “decisions involving the allocation and deployment of limited governmental resources are the type of administrative judgment that the discretionary function exception was designed to immunize from suit.”<sup>232</sup> The provision or withholding of virtually every FEMA benefit has been deemed a discretionary act, and immune from suit.<sup>233</sup>

If the question of FEMA’s insurance policy is reframed from whether it has discretion to use liability insurance as a criterion to whether it has the authority to do so without notice and comment rulemaking, the analysis looks more promising. Stated differently, does FEMA have the discretion to include this policy in its decision factors without formal regulations and rules procedures, or is that process “mandatory,” and hence, beyond the protection of the § 5148 immunity?

Though most of the Stafford Act’s aid provisions are written in

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226. *Id.* at 324.

227. 42 U.S.C. § 5174(e)(2) (2006 & Supp. V 2011); *see also* Berkovitz v. United States, 486 U.S. 531, 536 (1988).

228. *See* City of San Bruno v. FEMA, 181 F. Supp. 2d 1010, 1013–14 (N.D. Cal. 2001); Graham v. FEMA, 149 F.3d 997, 1006 (9th Cir. 1998); *see also supra* note 20 (highlighting the President’s delegation of powers to FEMA).

229. 42 U.S.C. § 5174; *see also* City of San Bruno, 181 F. Supp. 2d at 1013.

230. 42 U.S.C. § 5174; *see also* City of San Bruno, 181 F. Supp. 2d at 1013.

231. *See, e.g.,* Ornellas v. United States, 2 Cl. Ct. 378, 380 (1983).

232. *Graham*, 149 F.3d at 1006 (quoting Fang v. United States, 140 F.3d 1238, 1241 (9th Cir. 1998)).

233. *See id.*

permissive terms, giving the President and his authorized agents the option to act or to make determinations of functions and process, a few provisions give no such choice. Two statutory provisions could possibly be implicated in a challenge to the auto insurance mandate, either § 5174(j)'s directive to promulgate rules and regulations regarding eligibility standards<sup>234</sup> or § 5151(a)'s instruction to do the same to protect against discrimination on the basis of economic status in the granting of aid.<sup>235</sup> Each includes requirements that regulations "shall" be made, and § 5151 states the regulations "shall" include provisions that relief and assistance are provided in a nondiscriminatory manner.<sup>236</sup> Generally, agencies are directed by Congress to implement such rules and regulations as are needed to effectuate their missions and must proceed through the formal rulemaking process set out in the Administrative Procedures Act.<sup>237</sup> Central to the APA's functioning is the requirement of public notice and the opportunity for public comment.<sup>238</sup> The auto insurance eligibility requirement, binding on disaster survivor applicants, was not promulgated and vetted in this fashion.<sup>239</sup>

A district court in southern Texas was presented this question in regard to regulations governing aid for housing repair, challenged by plaintiffs as vague, and generally insufficient to satisfy the rulemaking mandates.<sup>240</sup> In *La Union del Pueblo Entero v. FEMA*, the court distinguished the provisions in the nondiscrimination statute, § 5151, from those in the eligibility for aid statute, § 5174.<sup>241</sup> It found the regulatory mandate in § 5151 to be discretionary, noting that despite the "shall issue" language, the mandate is tempered by the language that references only "*such regulations as may be necessary* for the guidance of personnel."<sup>242</sup> Read as a whole, the court found that the section provides that as such regulations are made, they *shall* include provisions to assure the assistance is accomplished in a nondiscriminatory

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234. 42 U.S.C. § 5174(j).

235. § 5151(a).

236. §§ 5151, 5174.

237. 5 U.S.C. § 553 (2006 & Supp. V 2011).

238. 5 U.S.C. § 553(b).

239. See *supra* text accompanying notes 35–41.

240. *La Union del Pueblo Entero v. FEMA*, No. B 08 487, 2009 WL 1346030, at \*1 (S.D. Tex. May 13, 2009), *vacated*, 608 F.3d 217, 220, 225 (5th Cir. 2010).

241. *Id.* at \*7; 42 U.S.C. §§ 5151(a), 5174(j).

242. *La Union del Pueblo Entero*, 2009 WL 1346030, at \*4, \*6–8; 42 U.S.C. § 5151(a) (emphasis added).

manner.<sup>243</sup> It is questionable whether the regulations adopted to enact § 5151 actually provide methods of ensuring that FEMA activities do not discriminate.<sup>244</sup> Instead, they provide assurances that the agency will not discriminate, and will create policies it “shall make available to employees, applicants, participants, beneficiaries, and other interested parties” information on “this regulation and its applicability to the programs or activities conducted by the agency” in “such manner as the head of the agency finds necessary.”<sup>245</sup> Still, the agency did enact regulations in some manner, and a court would likely be reluctant to find that the vagueness was so deficient as to have failed to comply with the regulation mandate.

The *La Union del Pueblo Entero* court contrasted the permissive language of the modifications of § 5151’s directive regarding the establishment of regulations with that of § 5174(j), which states unequivocally that “[t]he President shall prescribe rules and regulations to carry out this section [setting out various types of aid to individuals and households], including criteria, standards, and procedures for determining eligibility for assistance.”<sup>246</sup> The trial court granted the

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243. *La Union del Pueblo Entero*, 2009 WL 1346030, at \*4; 42 U.S.C. § 5151(a).

244. 42 U.S.C. § 5151(a); 44 C.F.R. § 206.11 (2011). The relevant portion of 44 C.F.R. § 206.11 reads:

Nondiscrimination in disaster assistance.

(a) Federal financial assistance to the States or their political subdivisions is conditioned on full compliance with 44 CFR part 7, Nondiscrimination in Federally-Assisted Programs.

(b) All personnel carrying out Federal major disaster or emergency assistance functions, including the distribution of supplies, the processing of the applications, and other relief and assistance activities, shall perform their work in an equitable and impartial manner, without discrimination on the grounds of race, color, religion, nationality, sex, age, or economic status.

(c) As a condition of participation in the distribution of assistance or supplies under the Stafford Act, or of receiving assistance under the Stafford Act, government bodies and other organizations shall provide a written assurance of their intent to comply with regulations relating to nondiscrimination.

(d) The agency shall make available to employees, applicants, participants, beneficiaries, and other interested parties such information regarding the provisions of this regulation and its applicability to the programs or activities conducted by the agency, and make such information available to them in such manner as the head of the agency finds necessary to apprise such persons of the protections against discrimination assured them by the Act and this regulation.

*Id.*

245. 44 C.F.R. § 206.11(d).

246. 42 U.S.C. §§ 5151, 5174(j).

plaintiffs injunctive relief on this basis.<sup>247</sup>

The Fifth Circuit Court of Appeals vacated the decision, though it agreed entirely with the trial court as to the nature of the two statutes.<sup>248</sup> Rather, it found that the rules and regulations provided by FEMA pursuant to § 5174 were not so lacking as to ensure plaintiffs substantial likelihood on the merits, and consequently the matter was not appropriate for injunctive relief.<sup>249</sup> Only if the court found the regulations “arbitrary, capricious, or manifestly contrary to statute” would it have agreed with the trial court, noting that within limits, courts should grant deference to agency exercise of delegated powers.<sup>250</sup>

The auto liability insurance requirement presents a somewhat different context. The same mandatory provision of § 5174(j) applies to all individual and household aid, and creates the obligation to enact “rules and regulations” regarding the granting of aid to disaster survivors.<sup>251</sup> Unlike the provisions of the Stafford Act at issue in *La Union del Pueblo Entero*, challenged on the basis that they were vague and unclear, and thus insufficient to satisfy the statute,<sup>252</sup> the eligibility qualifications in regard to auto insurance requirements have never appeared at all in the Federal Register or the C.F.R. They were never published for comment prior to their taking effect. In that sense, a more applicable case law comparison might be *MST Express v. Department of Transportation*.<sup>253</sup> By law, the Federal Highway Administration (FHWA) was directed to prescribe by regulation the specific initial and continuing requirements for safety fitness.<sup>254</sup> MST Express, a trucking company, claimed that the FHWA’s procedures for determining its “safety fitness rating” were unlawful because they “were not administered even-handedly and [were] therefore arbitrary and capricious.”<sup>255</sup> FHWA countered that it had met its legal obligation and was not subject to the rulemaking requirements because it had merely

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247. *La Union del Pueblo Entero*, 2009 WL 1346030, at \*10.

248. *La Union del Pueblo Entero v. FEMA*, 608 F.3d 217, 220, 225 (5th Cir. 2010).

249. *Id.*; 42 U.S.C. § 5174(j).

250. *La Union del Pueblo Entero*, 608 F.3d at 223 (quoting *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 844 (1984)).

251. 42 U.S.C. § 5174(j).

252. *La Union del Pueblo Entero*, 608 F.3d at 223.

253. *MST Express v. Dep’t of Transp.*, 108 F.3d 401 (D.C. Cir. 1997).

254. *Id.* at 402; see 49 U.S.C. § 31144(a) (2006 & Supp. V 2011).

255. *MST Express*, 108 F.3d at 401–02.



issued “interpretive rules.”<sup>256</sup> The District of Columbia Circuit Court of Appeals held that FHWA had not complied with its congressional directive to establish regulations for a differently stated reason: the agency had not established its rating via notice and comment rulemaking. Accordingly, it vacated the decision of the FHWA on the basis of its informally established criteria.<sup>257</sup>

Here, FEMA is similarly using a criterion that has not complied with its statutory directive to “prescribe rules and regulations” establishing the “criteria, standards, and procedures for determining eligibility for assistance.”<sup>258</sup> Or, more accurately, it is enforcing a criterion for eligibility that is not among the regulations it did promulgate in its regulation, and the court held that conduct violated its obligations.<sup>259</sup> If a court is persuaded that FEMA has not complied with this “mandatory” duty, it could invalidate the auto liability insurance mandate criteria to qualify for financial aid for a disaster-damaged vehicle.

V. “ARBITRARY, CAPRICIOUS, MANIFESTLY CONTRARY TO  
STATUTE,” OR AN “ABUSE OF DISCRETION”?

A different approach in seeking judicial review could assert that the auto liability mandate prerequisite to transportation aid is “arbitrary, capricious, or manifestly contrary to statute,”<sup>260</sup> which would permit a court to eradicate the use of that eligibility factor. Under the APA, actions found “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law” will be set aside.<sup>261</sup> The *La Union del Pueblo Entero* opinion by the Fifth Circuit made clear that while the regulations it reviewed were within the boundaries of the discretion of FEMA’s authority and challenges on lack of specificity are unlikely to be deemed acceptable, that discretion is not unbounded.<sup>262</sup> Neither does the examination of the facts end by determining that FEMA had authority to set its eligibility policy. As the Supreme Court stated in

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256. *Id.* at 405.

257. *Id.* at 406.

258. See 42 U.S.C. § 5174(j) (2006 & Supp. V 2011); see also *supra* note 20 (highlighting the President’s delegation of powers to FEMA).

259. *MST Express*, 108 F.3d at 402; 44 C.F.R. § 206.113 (2011).

260. This controlling standard for agency review was established in *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 844 (1984).

261. 5 U.S.C. § 706(2)(A) (2006).

262. See *La Union del Pueblo Entero v. FEMA*, 608 F.3d 217, 224 & n.3 (5th Cir. 2010).

*Citizens to Preserve Overton Park, Inc. v. Volpe*, “[t]o make this finding the court must consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment.”<sup>263</sup>

The insurance qualifying factor may be vulnerable to claims that FEMA has abused its discretion in its application. The language at the end of the FTCA’s immunity provision includes “whether or not the discretion be abused,” but this same phrase does not appear in the Stafford Act.<sup>264</sup> In *St. Tammany Parish*, the Fifth Circuit turned the government argument claiming that the parameters of FEMA’s discretion were different from that of the FTCA on its ear, by pointing out that missing language.<sup>265</sup> The same question had been raised, but not reached, by the Second Circuit Court of Appeals in *In re World Trade Center Disaster Site Litigation*.<sup>266</sup> If FEMA had its way in the argument denying application of the FTCA standard, in a classic “be careful what you wish for” scenario, it could have strengthened an argument that even its discretionary action can be abused. Plaintiffs parsing the two provisions for comparison may exploit that difference; the argument is certainly open to consideration.

FEMA has never articulated a sound reason for adopting

263. *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971), *abrogated by* *Califano v. Sanders*, 430 U.S. 99, 104–05 (1977).

264. *Compare* 28 U.S.C. § 2680(a) (2006 & Supp. V 2011), *with* 42 U.S.C. § 5148 (2006 & Supp. V 2011).

265. *St. Tammany Parish v. FEMA*, 556 F.3d 307, 321, 322 n.9 (5th Cir. 2009) (“We also note that § 2680(a) [of the FTCA], unlike [42 U.S.C.] § 5148, prohibits claims ‘whether or not the discretion involved be abused.’ Thus, the FTCA may protect against abuses of discretion, while the Stafford Act may not.”); *see In re World Trade Ctr. Disaster Site Litig.*, 521 F.3d 169, 189 n.21 (2d Cir. 2008).

We need not decide whether this distinction has any meaning in this case because the Parish has not argued that the government abused its discretion (it has limited its argument to whether the government had any discretion at all). We note this difference here only as additional evidence that our holding does not render § 5148 superfluous.

*St. Tammany Parish*, 556 F.3d at 322 n.9.

266. *In re World Trade Ctr. Disaster Site Litig.*, 521 F.3d at 189 n.21.

We note that immunity under the FTCA appears somewhat broader than that under the Stafford Act, as the FTCA adds ‘whether or not the discretion involved be abused.’ 28 U.S.C. § 2680(a). Whether this suggests that the discretionary function immunity contained in the Stafford Act does not protect a government agency or employee from charges of abuse of discretion is a question we need not reach.

*Id.*

compliance with state law as a valid criterion on which to base the award of transportation benefits. Accordingly, it is difficult to predict how the government might address the contention that the requirement is arbitrary and capricious. In *Beno v. Shalala*, the Ninth Circuit stated that a court should not “infer an agency’s reasoning from mere silence.”<sup>267</sup> Thus far, FEMA has offered no reasoning for this rule, and certainly has not demonstrated that it has “consider[ed] . . . relevant factors.”<sup>268</sup> It would be difficult to argue that refusing aid to those without liability insurance somehow furthers the mission of FEMA. The demographic profiles of uninsured motorists,<sup>269</sup> seem to fall well within the categories of needy and disadvantaged disaster survivors about whom Congress expressed concern when considering disaster response legislation.<sup>270</sup> The failure to assist the uninsured in this one category, and not in any other category of uninsured losses, is inexplicable. Though this argument seems promising, we are warned that “[a]lthough this inquiry into the facts is to be searching and careful, the ultimate standard of review is a narrow one. The court is not empowered to substitute its judgment for that of the agency.”<sup>271</sup>

#### VI. CONSTITUTIONAL VIOLATION?

As we know, the Stafford Act’s nonliability statute does not invoke the full spectrum of sovereign immunity for FEMA. Courts have clarified that § 5148 protection runs only to nondiscretionary acts, and unlike the FTCA, may not even protect against abuse of discretion.<sup>272</sup> A defense of virtually complete immunity and lack of jurisdiction over all claims against FEMA, even constitutional ones, seems unlikely to result in a wholesale dismissal.<sup>273</sup> Nevertheless, consistent with its far-reaching view of immunity under the Stafford Act, the government has taken the position that § 5148 protects FEMA from challenges of unconstitutional

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267. *Beno v. Shalala*, 30 F.3d 1057, 1073–74 (9th Cir 1994).

268. *Id.*

269. *Khazzoom*, *supra* note 79, at 85 tbl.4.

270. *See supra* notes 49–56 and accompanying text.

271. *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971), *abrogated by* *Califano v. Sanders*, 430 U.S. 99, 104–05 (1977).

272. *St. Tammany Parish v. FEMA*, 556 F.3d 307, 322 n.9 (5th Cir. 2009); *In re World Trade Ctr. Disaster Site Litig.*, 521 F.3d 169, 189 n.21 (2d Cir. 2008).

273. *McWaters II*, 436 F. Supp. 2d 802, 812–13 (E.D. La. 2006); *McWaters v. FEMA (McWaters I)*, 408 F. Supp. 2d 221, 228–29 (E.D. La. 2005).

conduct.<sup>274</sup> In *McWaters II*, a district court case also brought by Hurricane Katrina survivors in 2005, challenging several actions and procedures by FEMA in providing rental assistance and housing benefits, the government sought dismissal of constitutional violations on the basis of immunity.<sup>275</sup> Plaintiffs brought claims against FEMA on the basis of violations of the Stafford Act, Due Process Clause, and Administrative Procedure Act and sought injunctive and declaratory relief.<sup>276</sup> The *McWaters v. FEMA (McWaters I)* court's opinion reflects a somewhat incredulous tone addressing the contention that FEMA is immune from suit for constitutional violations, remarking that "it is also the government's position that FEMA may commit unconstitutional acts and likewise not be subject to judicial review."<sup>277</sup> Indeed, in *McWaters II*, the government took the position that "this Court lacks subject matter jurisdiction" even though plaintiffs allege various constitutional violations.<sup>278</sup> As the Supreme Court has explained, the United States must waive sovereign immunity for a court to exercise subject matter jurisdiction over it, even if the plaintiff alleges a constitutional claim.<sup>279</sup> Relying on *Lynch v. United States*, the government asserted that FEMA is immune from suit arising from constitutional causes of action.<sup>280</sup>

Judicial review of agency action alleged to be unconstitutional has a conflicted history, with courts taking positions that, carried to logical

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274. *McWaters II*, 436 F. Supp. 2d at 812.

275. *Id.* at 805, 811–12.

276. *McWaters I*, 408 F. Supp. 2d at 226.

277. *Id.* at 228.

278. *McWaters II*, 436 F. Supp. 2d at 812.

279. *Id.* at 811–12 & n.16 (mentioning that FEMA "adamantly denies any unconstitutional action or any unlawful acts"). This is not merely a characterization of FEMA's position by the court. In its post-trial brief, the government contented that:

Further, this Court lacks subject matter jurisdiction even though plaintiffs allege various constitutional violations. As the Supreme Court has explained, the United States must waive sovereign immunity for a court to exercise subject matter jurisdiction over it, even if the plaintiff alleges a constitutional claim. "The sovereign's immunity from suit exists whatever the character of the proceeding or the source of the right sought to be enforced. It applies alike to causes of action arising under acts of Congress, and to those arising from some violation of rights conferred upon the citizen by the Constitution."

Defendant's Post-Trial Brief, *supra* note 162, at 4 (quoting *Lynch v. United States*, 292 U.S. 571, 582 (1934)).

280. Defendant's Post-Trial Brief, *supra* note 162, at 4 (citing *Lynch v. United States*, 292 U.S. 571, 582 (1934)).

conclusions, are hard to reconcile.<sup>281</sup> The Supreme Court stated in *Califano v. Sanders*, “when constitutional questions are in issue, the availability of judicial review is presumed, and we will not read a statutory scheme to take the ‘extraordinary’ step of foreclosing jurisdiction unless Congress’ intent to do so is manifested by ‘clear and convincing’ evidence.”<sup>282</sup> In the Eleventh Circuit Court of Appeals’ 1987 decision, *Rosas v. Brock*, the court stated “[i]t is far from clear that Congress could prevent judicial review of unconstitutional agency action.”<sup>283</sup> Yet reasoning from other circuits leaves the question open, at least theoretically.<sup>284</sup>

The precedent in respect to the context of constitutional questions regarding FEMA conduct in distributing benefits is clearer. The *McWaters II* court relied on *Rosas* in holding that constitutional questions such as the one presented to it were, indeed, subject to review.<sup>285</sup> It agreed with the Eleventh Circuit that agency conduct consistent with the Constitution is not a *discretionary* act, but a *mandatory* one.<sup>286</sup> Once again, the “discretionary function” determination was dispositive as to the question of jurisdiction for judicial review.<sup>287</sup>

Despite the government’s arguments contending that FEMA is subject to immunity from review of allegedly unconstitutional acts, arguments the government may well attempt in other circuits, it seems likely that a court would find constitutional questions raised by the adoption of a policy alleged to be discriminatory to be within its scope of review. In such a case, a court would likely at least examine the merits of the alleged acts to see if plaintiffs state a colorable claim for an unconstitutional act or omission, as did the *McWaters II* court.

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281. For discussion of the complexity of this issue, see RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE § 17.9 (5th ed. 2010).

282. *Califano v. Sanders*, 430 U.S. 99, 109 (1977) (quoting *Weinberger v. Salfi*, 422 U.S. 749, 762 (1975)).

283. *Rosas v. Brock*, 826 F.2d 1004, 1008 (11th Cir. 1987) (citing *Bowen v. Mich. Acad. of Family Physicians*, 476 U.S. 667, 681 n.12 (1986); *Campbell v. Office of Pers. Mgmt.*, 694 F.2d 305, 307 (3d Cir. 1982) (“[I]t is well-established that Congress cannot preclude judicial review of allegedly unconstitutional agency action . . .”).

284. PIERCE, *supra* note 281, § 17.9.

285. *McWaters II*, 436 F. Supp. 2d 802, 812 n.18, 813 n.20 (E.D. La. 2006).

286. *Id.* at 813 n.20.

287. *Id.* at 812–14.

### A. Due Process

Challenges to FEMA actions for denial of benefits have sometimes been brought under the Fifth Amendment Due Process Clause. To establish a due process violation, plaintiffs must show that they have a protected property interest and that “FEMA’s procedures are constitutionally inadequate.”<sup>288</sup> Government benefits may be a form of property protected by the due process clause, but not all such benefits are within its protections.<sup>289</sup> The United States Supreme Court has held that only where a person has a “legitimate claim of entitlement” to a benefit, and not a mere “abstract need or desire” or a “unilateral expectation” of receipt of the benefit does the due process protection arise.<sup>290</sup>

In *Ridgely v. FEMA*,<sup>291</sup> plaintiffs received rental assistance after Hurricane Katrina pursuant to section 408 of the Stafford Act, which deems individuals eligible for certain financial benefits if he or she is displaced from a home rendered uninhabitable as a result of a major disaster.<sup>292</sup> The section’s corresponding regulations set out the criteria for both the initial application and continued rent assistance.<sup>293</sup> The four representative *Ridgely* plaintiffs were each displaced from their homes and received financial rent assistance as a result of the disaster.<sup>294</sup> Each representative plaintiff was told that the assistance would cover three months’ rent but that they could apply for additional funds in the future, if necessary.<sup>295</sup> After the expiration of the period granted, they then received retroactive notices that they were no longer eligible for the assistance, with little time to find alternative housing.<sup>296</sup> Moreover, some were told they must repay what they had received since the determination on ineligibility.<sup>297</sup> They contended they had an interest in

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288. *Ridgely v. FEMA*, 512 F.3d 727, 734 (5th Cir. 2008) (citing *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 428 (1982)).

289. *Id.* at 735.

290. *See, e.g.*, *Barry v. Barchi*, 443 U.S. 55, 70 n.2 (1979) (Brennan, J., concurring) (citing *Bd. of Regents v. Roth*, 408 U.S. 564, 577 (1972)).

291. *Ridgely*, 512 F.3d at 727.

292. *Id.* at 729; *see* 42 U.S.C. § 5174(b)(1) (2006 & Supp. V 2011).

293. 44 C.F.R. §§ 206.113–.114 (2011).

294. *Ridgely*, 512 F.3d at 729–30.

295. *Id.*

296. *Id.* at 730.

297. Complaint at 24, 28–31, *Ridgely v. FEMA*, No. 07-2146, 2007 WL 1728724 (E.D. La. June 13, 2007), *vacated*, *Ridgely v. FEMA*, 512 F.3d 727, 734 (5th Cir. 2008).

the ongoing housing assistance that was wrongly taken without proper procedures.<sup>298</sup>

Addressing the question of whether the rent assistance created a property interest needed to support a due process obligation on the part of FEMA, the Fifth Circuit Court of Appeals engaged in an analysis and comparison of FEMA benefits to other government benefits.<sup>299</sup> First, it examined the statutory language to determine the level of discretion given to the agency.<sup>300</sup> To find a property interest, the court must first find “explicitly mandatory language, *i.e.*, specific directives to the decisionmaker [sic] that if the regulations’ substantive predicates are present, a particular outcome must follow.”<sup>301</sup> The court examined both section 408 and its corresponding implementation regulations, finding that each was written in entirely permissive, not mandatory, terms.<sup>302</sup>

Next, the court addressed whether the plaintiffs—who were receiving rental assistance—acquired a property interest in the continued payment of benefits.<sup>303</sup> The lower court accepted the argument that once granted the benefit the plaintiffs were entitled to continued assistance, and therefore, plaintiffs had a property interest sufficient for due process procedures to be guaranteed under the Constitution.<sup>304</sup> Relying on United States Supreme Court decisions that held continuing benefits from Social Security and welfare created a property interest,<sup>305</sup> on appeal plaintiffs disputed the government’s position that the quarterly payments were effectively a termination and reissuance of rental aid.<sup>306</sup> They noted that the three-month term for benefits is simply an informal policy of FEMA for its own convenience and purposes, not consistently applied, and that continuation of the benefits is similar to other benefit programs where continued or

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298. *Ridgely*, 512 F.3d at 734–35.

299. *Id.* at 736–37.

300. *Id.* at 736.

301. *Id.* at 735–36 (internal quotation marks omitted) (quoting *Ky. Dep’t of Corr. v. Thompson*, 490 U.S. 454, 463 (1989)).

302. *Id.* at 736.

303. *Id.* at 738–40.

304. *Ridgely v. FEMA*, No. 07-2146, 2007 WL 1728724, at \*6 (E.D. La. June 13, 2007).

305. *Id.* (citing *Mathews v. Eldridge*, 424 U.S. 319, 332 (1976) (holding that a social security benefit was property interest sufficient for due process protections); *Goldberg v. Kelly*, 397 U.S. 254, 261–64 (1970) (finding that plaintiffs who were denied welfare benefits had a property interest in those benefits which entitled them to a due process hearing)); *Ridgely*, 512 F.3d at 736.

306. *Ridgely*, 512 F.3d at 731–32, 738 n.10.



occasional assurance of the recipient's ongoing qualification is required.<sup>307</sup> All in all, the court found the facts failed to establish that plaintiffs had a property interest sufficient to support a due process claim.<sup>308</sup>

A plaintiff claiming benefits pursuant to the "financial assistance" provisions of the Stafford Act and its regulations<sup>309</sup> would have substantial difficulty establishing a "property interest" in such benefits because of the permissive nature of the laws and regulations establishing authority for that relief. Accordingly, a due process challenge to the insurance mandate seems unlikely to be successful.

### B. Equal Protection

A claim regarding the auto liability eligibility factor under the Equal Protection Clause could have more legs than a Due Process claim. A claim against FEMA for economic discrimination would be both a Stafford Act statutory violation and an equal protection violation.<sup>310</sup> A plaintiff might succeed in obtaining judicial review—or at least prevail against a motion to dismiss for lack of jurisdiction—of a FEMA decision that allegedly constituted a constitutional violation, even if the implementation and application of the policy would otherwise be considered a "discretionary function" and immune from suit under § 5148.<sup>311</sup> Here, an action that alleged discrimination on the basis of economic status is more likely within the jurisdiction of the courts, so long as the constitutional claim is "colorable."<sup>312</sup>

How a challenge on that basis would fare in an Equal Protection analysis is, at very best, uncertain. The United States Supreme Court "has never held that financial need alone identifies a suspect class for purposes of equal protection analysis."<sup>313</sup> Actions which affect those of different economic status, treated as a nonsuspect classification, are subject to profound deference so long as the agency actions have any rational relationship to a legitimate end of government.<sup>314</sup> Unless a

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307. *Id.* at 738 n.10.

308. *Id.* at 740.

309. *See* 42 U.S.C. § 5174 (2006 & Supp. V 2011).

310. *See McWaters II*, 436 F. Supp. 2d 802, 817–18, 820–21 (E.D. La. 2006).

311. *Id.* at 813, 818; *see supra* notes 272–74 and accompanying text.

312. *See McWaters II*, 436 F. Supp. 2d at 813.

313. *Maier v. Roe*, 432 U.S. 464, 471 (1977) (citing *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 29 (1973); *Dandridge v. Williams*, 397 U.S. 471, 485 (1970)).

314. *Rodriguez*, 411 U.S. at 17, 28–29.

practice involves a fundamental right, such as voting or trial level indigent criminal defense—to which this right clearly does not rise—

courts consider a regulation that may discriminate on the basis of economic status to be one concerning economic and social welfare policy and a legitimate exercise of governmental authority and discretion.<sup>315</sup> Categorized in that manner, the FEMA insurance eligibility factor cannot be held to the higher level of scrutiny applicable to suspect classes,<sup>316</sup> such as the strict scrutiny applied to racial classification<sup>317</sup> or the intermediate scrutiny applied to gender classifications.<sup>318</sup>

In that respect, the insurance mandate is not significantly different than other class “rational basis” questions presented to the United States Supreme Court. Professor Robert C. Farrell noted in a 1999 article that between 1971 and 1996, in only ten Supreme Court cases did a plaintiff defeat a rational basis defense by the government; one hundred had failed.<sup>319</sup> None of those cases involved an economic classification.<sup>320</sup> While the mandatory insurance requirement does not appear to be “rationally related” to the purposes of the Stafford Act,<sup>321</sup>

315. *Dandridge*, 397 U.S. at 486–87, *rehearing denied* 398 U.S. 914 (1970).

316. The grating of a gratuitous benefit, such as aid from FEMA, is not the kind of right protected by heightened scrutiny. See *Plyler v. Doe*, 457 U.S. 202, 217 n.15 (1982) (“In determining whether a class-based denial of a particular right is deserving of strict scrutiny under the Equal Protection Clause, we look to the Constitution to see if the right infringed has its source, explicitly or implicitly, therein.”).

317. See *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 226 (1995).

318. See *United States v. Virginia*, 518 U.S. 515, 531 (1996).

319. Robert C. Farrell, *Successful Rational Basis Claims in the Supreme Court from the 1971 Term Through* *Romer v. Evans*, 32 IND. L. REV. 357, 357 (1999).

320. *Id.* at 411 (“The groups disadvantaged in these ten cases were newcomers, out-of-staters, hippies, undocumented aliens, the mentally retarded, non-freeholders, and gays.” (footnotes omitted)).

321. Robert T. Stafford Disaster Relief and Emergency Assistance Act of 1974, Pub. L. No. 93-288, 88 Stat. 143 (codified as amended at 42 U.S.C. §§ 5121–5207 (2006 & Supp. V 2011)).

It is the intent of the Congress, by this Act, to provide an orderly and continuing means of assistance by the Federal Government to State and local governments in carrying out their responsibilities to alleviate the suffering and damage which result from such disasters by—

- (1) revising and broadening the scope of existing disaster relief programs;
- (2) encouraging the development of comprehensive disaster preparedness and assistance plans, programs, capabilities, and organizations by the States and by local governments;

the bar is so low for FEMA to find a relationship to its mission that a court might be obliged to find in the agency's favor. FEMA does have a charge to "encourag[e] individuals" to obtain insurance, which might be sufficient to justify its use as an eligibility factor.<sup>322</sup> Still, it is a stretch of logic to think that a policy that would not protect the property at issue in any event and that only affects a vehicle owner postdisaster has the effect to "encourage" households to comply with state liability insurance laws. It is difficult to imagine a family who cannot afford auto liability insurance being motivated to purchase it nonetheless in the unlikely event that a major disaster were to threaten their personal transportation.<sup>323</sup>

## VII. POLITICAL ACTION

One solution that would avoid the time, expense, and uncertainty of a legal challenge to the FEMA requirement of auto liability insurance would be political action by the legislative or executive branch. An informal, but binding, rule such as the auto insurance mandate could be altered within the agency itself or through direction from Congress, FEMA's administration, or other executive branch authority. FEMA has an Office of Equal Rights,<sup>324</sup> which as far as can be determined, has

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(3) achieving greater coordination and responsiveness of disaster preparedness and relief programs;

(4) encouraging individuals, States, and local governments to protect themselves by obtaining insurance coverage to supplement or replace governmental assistance;

(5) encouraging hazard mitigation measures to reduce losses from disasters, including development of land use and construction regulations; and

(6) providing Federal assistance programs for both public and private losses sustained in disasters[.]

42 U.S.C. § 5121(b). The Stafford Act also included "(7) providing a long-range economic recovery program for major disaster areas." Robert T. Stafford Disaster Relief and Emergency Assistance Act of 1974, Pub. L. No. 93-288, § 101, 88 Stat. 143, 144 (codified as amended at 42 U.S.C. §§ 5121-5207).

322. 42 U.S.C. § 5121(b)(4).

323. Stephanie K. Jones, *Uninsured Drivers Travel Under the Radar*, INS. J., Aug. 18, 2003, at 20, 21 ("I think given choices and a limited amount of money, most people will choose to pay their rent first, feed their kids second or some order thereof," said Texas Insurance Commissioner Jose Montemayor. "And I think insurance falls pretty quickly a distant choice. Unfortunately, this is reality.").

324. *Civil Rights Program*, FEMA, <http://www.fema.gov/civil-rights-program> (last updated July 16, 2012). FEMA explains the function of the Office of Equal Rights:

yet to be presented with this issue. Pursuit of this type of action seems worth the effort in light of the benefits to poor disaster survivors and the alternative of lengthy and uncertain legal battles.

### VIII. CONCLUSIONS

Transportation is critical in disaster response, recovery, and rebuilding. Obtaining basic shelter, food, water, and medical assistance in the days, weeks, and years following a disaster will likely require more dependence on private transportation than predisaster routines. Assuring that households and individuals may become as self-reliant—

and available to help others—as quickly as possible is a highly desirable goal and absolutely essential to the larger good.<sup>325</sup> Unrepaired and damaged vehicles on the roads can be dangerous to both their passengers and others. It is counterintuitive and a direct impediment to recovery for federal disaster response to provide assistance for repair and replacement of personal vehicles, only to deny assistance to those unable to afford private insurance.<sup>326</sup> The FEMA policy serves no purpose other than to punish auto owners who have not complied with state mandatory liability insurance laws<sup>327</sup>—a goal totally unrelated to

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Complaints Resolution - Applicants for or recipients of FEMA federal funds, services or benefits who believe they have been discriminated against may contact the Office of Equal Rights (OER) to obtain complaint processing assistance. Generally applicants are described as the general public or disaster survivors (i.e. persons who have applied for individual disaster assistance) and contractors or sub-grantees (i.e. person, company or state/local entity that has applied to be awarded or has been awarded FEMA federal funds.) Furthermore, person or persons who represent the “general public, disaster survivors, contractors or sub-grantees” can also obtain complaint processing assistance from OER.

The matter will be looked into informally by an Equal Rights Specialist. If the issue cannot be resolved informally, a formal written complaint may be filed with OER. This office is responsible for processing complaints, issuing acknowledgements and acceptance/dismissals; conducting investigations and compliance reviews; and issuing final decisions.

*Id.*

325. FED. EMERGENCY MGMT. AGENCY, FEMA PUBLICATION 30 (1st ed. Nov. 2010), available at <http://www.fema.gov/pdf/about/pub1.pdf> [hereinafter FEMA PUBLICATION] (“The response mission seeks to conduct emergency operations to save lives and property through positioning emergency equipment, personnel, and supplies; evacuating survivors; providing food, water, shelter, and medical care to those in need; and restoring critical public services.”).

326. See *supra* notes 22–30 and accompanying text.

327. *Why am I Not Eligible for Assistance?*, *supra* note 23 (“IVINS-Vehicle - No Liability Insurance: Disaster assistance may not be provided for a vehicle that does not meet

the critical need of assisting those whose lives have been affected by a major disaster.

This effect is even more questionable when the state law that FEMA is enforcing against survivors is of questionable value in coping with the real problem of uninsured vehicles on our roads.<sup>328</sup> Mandatory liability insurance may have a worthy goal of assuring that drivers on our roads will be covered for bodily injury and property damage caused by at-fault uninsured vehicle drivers, and states are certainly within their rights to enact and enforce auto insurance mandates to address the problem. The effectiveness of these laws, however, is highly questionable in truly reducing the problem of uninsured drivers.<sup>329</sup> While that decision is, of course, left to state legislators, wholesale adoption of these laws by a federal government agency with no relation to the problem is inexplicable.

Moreover, the demographics of uninsured motorists illustrate that they are largely low income and cite the expense of auto insurance as the primary reason for failure to comply with mandatory liability insurance laws.<sup>330</sup> An almost equal number are not insuring a vehicle because it is not currently being used,<sup>331</sup> a rational reason that could be remedied should a previously unused vehicle be needed. These owners are denied any assistance with repair in the event of damage from a disaster, even if they were to insure the vehicle in the future.<sup>332</sup> Thus, even those who would insure a car once operational, or to add it to an existing policy, cannot get the help they may need to secure necessary transportation postdisaster. The disproportionate effect of mandatory insurance laws is exacerbated by indications that insurance companies may discriminate against low-income drivers in both subtle and direct ways.<sup>333</sup> Use of proxies such as credit ratings and other demographics allow insurance companies to, in effect, use the prohibited consideration of income as a factor in extending coverage.<sup>334</sup> Basic liability policies

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the terms of state law.”).

328. *Mandatory Auto Insurance Does Not Reduce Number of Uninsured Drivers, Says Insurer Trade Group*, *supra* note 34.

329. *Id.*

330. Khazzoom, *supra* note 79, at 85, 87.

331. HUNSTAD, *supra* note 94, at 5.

332. *See Why am I Not Eligible for Assistance?*, *supra* note 23.

333. *CFA Releases Study on Economic Harm to LMI Households from Over Price Auto Insurance*, *supra* note 145 (referring to Brobeck & Hunter, *supra* note 140).

334. Brobeck & Hunter, *supra* note 140.

may cost more than full coverage for some drivers, and low-cost policies give such little protection that they may not be worth the expense to a household of few means.<sup>335</sup>

Incorporating state auto insurance laws into a FEMA policy that penalizes survivors of disaster for lack of compliance directly conflicts with its larger policy goals and missions of assisting in disaster response, recovery, and rebuilding.<sup>336</sup> Under the circumstances of most uninsured vehicle owners—those too poor to qualify for low-interest loans—the denial of financial assistance to repair or replace the auto serves no purpose consistent with FEMA’s mission. The value to the federal government of this eligibility roadblock is dubious, and one wonders how it came about.

Finally, FEMA’s adoption of this requirement without rulemaking is troubling. The Stafford Act requires that rules for eligibility for benefits be promulgated with opportunity for comment and response. Despite that directive, the liability insurance requirement appears only in the most informal sources, with no rationale offered other than to comply with state laws.<sup>337</sup> The lack of rulemaking renders the informal policy a potential statutory violation and has prevented an open forum in which to discuss the role of FEMA, the needs of disaster survivors denied benefits on the basis of lack of auto liability insurance, and the futility of attempts to enforce a variety of state laws in a disaster response context. FEMA may be most vulnerable to judicial review of the policy by way of this failure of process, since neither the Stafford Act nonliability provisions nor principals of sovereign immunity will protect it from judicial review where the disputed action is mandatory, such as in § 5174(j).<sup>338</sup>

Ironically, the cost of providing this aid is one of the lesser expenses encountered in disaster response. It is difficult to estimate the number of affected households, since the total includes not only denials on the lack-of-liability-insurance basis, but also those who did not apply because the published criteria, information from the agency representatives, or legal advice led them to believe it was futile.

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335. *Id.*

336. FEMA PUBLICATION, *supra* note 325, at 17.

337. *Why am I Not Eligible for Assistance?*, *supra* note 23 (“IVINS-Vehicle - No Liability Insurance: Disaster assistance may not be provided for a vehicle that does not meet the terms of state law.”).

338. 42 U.S.C. §§ 5148, 5174(j) (2006 & Supp. V 2011).

However, the permissible maximum amount granted per claim for all “other” (nonhousing) needs is \$15,000, and the average grant is \$2,000.<sup>339</sup> This relatively small amount could be sufficient to restore a vehicle to operation or it could be pooled among households to purchase a shared vehicle. We know that a large percentage of uninsured vehicles are older models, many more than ten years old, and may have retained little monetary value.<sup>340</sup> Only those with the most desperate financial situations—those unable to qualify for SBA low-interest disaster loans—would be within the grantees.<sup>341</sup> Yet, one can easily imagine that the availability of transportation could make the difference in the ability to become self-reliant after a disaster.

Court challenge, agency action, or reconsideration by the administration of FEMA’s position on this policy is warranted. FEMA

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339. FED. EMERGENCY MGMT. AGENCY, UNIT 7: INDIVIDUAL ASSISTANCE 7.7 tbl. (2010), available at [http://training.fema.gov/emiweb/is/IS208A/08\\_SDM\\_Unit\\_07\\_508.pdf](http://training.fema.gov/emiweb/is/IS208A/08_SDM_Unit_07_508.pdf). FEMA describes the limits of “Other Needs Assistance” in its Disaster Assistance for Individuals and Business Owners Table. *Id.* The Table is divided into “Program/Agency” and lists the “Assistance,” “Eligibility,” “Specific Criteria,” and “Supplemental Materials Reverence” associated with each program or agency. *Id.* For the “IHP: Other Needs Assistance” program, “[a]dministered and funded by FEMA,” the Table lists the “Assistance,” “[g]rants to meet serious disaster-related needs and necessary expenses not covered by insurance or other Federal, State, or voluntary agencies;” the “Eligibility,” “[a]vailable to persons and households with serious unmet needs who do not qualify for SBA disaster loans;” the “Specific Criteria,” “[m]aximum grant of up to \$15,000[] depending on family composition and needs,” noting that the “[c]ap changes each fiscal year to accommodate Consumer Price Index” but that “[t]he average grant is approximately \$2,000;” and the “Supplemental Materials Reverence,” “IHP Fact Sheet.” *Id.*

340. See HUNSTAD, *supra* note 94, at 6; Khazzoom, *supra* note 79, at 85 tbl.4.

341. *Do I Qualify for “Other Than Housing Needs” Assistance?*, FEMA, <http://www.fema.gov/do-i-qualify-other-housing-needs-assistance> (last updated June 25, 2012). FEMA states the eligibility for “Other Than Housing Needs” as follows:

To receive money for “Other Than Housing Needs” that are the result of a disaster, all the following must be true:

- You have losses in an area that has been declared a disaster area by the President.
- You have filed for insurance benefits and the damage to your property is not covered by your insurance or your insurance settlement is insufficient to meet your losses.
- You or someone who lives with you is a citizen of the United States, a non-citizen national, or a qualified alien.
- You have necessary expenses or serious needs because of the disaster.
- You have accepted assistance from all other sources for which you are eligible, *such as insurance proceeds or Small Business Administration disaster loans*.

*Id.* (emphasis added).



acknowledges that “[r]ecovery focuses not only on saving and sustaining lives, but also on providing for the short- and long-term needs of individuals and communities.”<sup>342</sup> If a thoughtful, thorough examination of the effects of the auto insurance mandate were undertaken in light of FEMA’s true purpose, the questions regarding the legality and the wisdom of the policy create difficulty justifying retention of the standard.

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342. FEMA PUBLICATION, *supra* note 325, at 35.